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Vol. 1

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1891

CONTENTS OF LAST REPORT

OF THE YEAR 1890

BY J. M. FISHMAN

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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

**COURTS OF LAST RESORT
OF THE SEVERAL STATES.**

SELECTED, REPORTED, AND ANNOTATED

**By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS"**

VOL. VII.

**SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
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VOL. VII.

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1889

AMERICAN STATE REPORTS.

VOL. VII.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS. Vol. 85.	17-77
ARKANSAS REPORTS. Vol. 50.	78-122
CALIFORNIA REPORTS. Vol. 75.	123-197
COLORADO REPORTS. Vol. 11.	198-271
CONNECTICUT REPORTS. Vol. 56.	272-323
ILLINOIS REPORTS. Vol. 124.	324-402
INDIANA REPORTS. Vol. 115.	403-465
IOWA REPORTS. Vol. 74.	466-511
KANSAS REPORTS. Vol. 39.	512-570
KENTUCKY REPORTS. Vol. 85.	571-628
MISSISSIPPI REPORTS. Vol. 65.	629-683
NEW YORK REPORTS. Vol. 111.	684-778
NEW JERSEY LAW REPORTS. . . . Vol. 50.	779-817
WISCONSIN REPORTS. Vol. 72.	818-909

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SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA. — (83) **3**; (84) **5**; (85) **7**.
ARKANSAS. — (48) **3**; (49) **4**; (50) **7**.
CALIFORNIA. — (72) **1**; (73) **2**; (74) **5**; (75) **7**.
COLORADO. — (10) **3**; (11) **7**.
CONNECTICUT. — (54) **1**; (55) **3**; (56) **7**.
DELAWARE. — (5 *Houst.*) **1**.
FLORIDA. — (22) **1**.
GEORGIA. — (76) **2**; (77) **4**; (78) **6**.
ILLINOIS. — (121) **2**; (122) **3**; (123) **5**; (124) **7**.
INDIANA. — (112) **2**; (113) **3**; (114) **5**; (115) **7**.
IOWA. — (72) **2**; (73) **5**; (74) **7**.
KANSAS. — (37) **1**; (38) **5**; (39) **7**.
KENTUCKY. — (83, 84) **4**; (85) **7**.
LOUISIANA. — (39 *La. Ann.*) **4**.
MAINE. — (79) **1**; (80) **6**.
MARYLAND. — (67) **1**; (68) **6**.
MASSACHUSETTS. — (145) **1**; (146) **4**.
MICHIGAN. — (60, 61) **1**; (62) **4**; (63) **6**.
MINNESOTA. — (36) **1**; (37) **5**.
MISSISSIPPI. — (65) **7**.
MISSOURI. — (92) **1**; (93) **3**; (94) **4**; (95) **6**.
NEBRASKA. — (22) **3**.
NEVADA. — (19) **3**.
NEW JERSEY. — (43 *N. J. Eq.*) **3**; (44 *N. J. Eq.*) **6**; (50 *N. J. L.*) **7**.
NEW YORK. — (107) **1**; (108) **2**; (109) **4**; (110) **6**; (111) **7**.
NORTH CAROLINA. — (97, 98) **2**; (99, 100) **6**.
OHIO. — (45 *Ohio St.*) **4**.
OREGON. — (15) **3**.
PENNSYLVANIA. — (115, 116, 117 *Pa. St.*) **2**; (118, 119 *Pa. St.*) **4**; (120, 121 *Pa. St.*) **6**.
RHODE ISLAND. — (15) **2**.
SOUTH CAROLINA. — (26) **4**.
TENNESSEE. — (85) **4**; (86) **6**.
TEXAS. — (68) **2**; (69, 24 *Tex. App.*) **5**.
VERMONT. — (60) **6**.
VIRGINIA. — (82) **3**; (83) **5**.
WEST VIRGINIA. — (29) **6**.
WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**.

AMERICAN STATE REPORTS.

VOL. VII.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Adams v. Schiffer.....	<i>Contracts</i>	11 Col. 15.	202
Alvey v. Reed.....	<i>Mechanics' liens</i>	115 Ind. 148.....	418
American Mutual Aid Society v. Helburn.....	<i>Insurance</i>	85 Ky. 1.....	571
Anderson v. Sloane.....	<i>Executions</i>	72 Wis. 566.....	885
Andre v. Morrow.....	<i>Set-off</i>	65 Miss. 315.....	658
Avery v. Meikle....	<i>Trade-marks</i>	85 Ky. 435.....	604
Barrett v. Hinckley.....	<i>Ejectment</i>	124 Ill. 32.....	331
Baughman v. Reed.....	<i>Land'd and tenant</i> ..	75 Cal. 319.....	170
Birmingham Water-works Company v. Hubbard.....	<i>Master and servant</i> ..	85 Ala. 179.....	35
Blodgett v. Abbot.....	<i>Common carriers</i> ..	72 Wis. 516.....	873
Board of Supervisors of Lauderdale County v. Alford.....	<i>Suretyship</i>	65 Miss. 63.....	637
Boylan v. Warren.....	<i>Records</i>	39 Kan. 301.....	551
Bradley v. Bailey.....	<i>Estates for life</i>	56 Conn. 374.....	316
Brandon v. Moore.....	<i>Homesteads</i>	50 Ark. 247.....	98
Brannen v. Kokomo, Greentown, and Jerome Gravel Road Co..	<i>Negligence</i>	115 Ind. 115.....	411
Brison v. Brison.....	<i>Trusts</i>	75 Cal. 525.....	189
Brown v. City of Atchison.....	<i>Municipal bonds</i> ...	39 Kan. 37.....	516
Brown v. De Groff.....	<i>Nuisance</i>	50 N. J. L. 409...	794
Brown v. Norman.....	<i>Contracts</i>	65 Miss. 369.....	663
Brown v. State Insurance Co....	<i>Insurance</i>	74 Iowa, 428.....	495
Brown and Brothers v. Brown....	<i>Ex'rs and adm'rs</i> ..	56 Conn. 249.....	307
Bush v. Roberts.....	<i>Deeds</i>	111 N. Y. 478.....	741
Byam v. Collina.....	<i>Libel</i>	111 N. Y. 143.....	726
Card v. Foot.....	<i>Evidence</i>	56 Conn. 369.....	311
Cannon v. Lindsey.....	<i>Partnership</i>	85 Ala. 198.....	38
Central Railroad and Banking Co. v. Cheatham.....	<i>Rewards</i>	85 Ala. 292.....	48
Chever v. Horner.....	<i>Public lands</i>	11 Col. 68.....	217
Chicago Quartz Mining Company v. Oliver.....	<i>Public lands</i>	75 Cal. 194.....	143

NAME.	SUBJECT.	REPORT.	PAGE.
City Railway Company v. Lee.....	<i>Negligence</i>	50 N. J. L. 435...	798
Clancy v. Kenworthy.....	<i>Suretyship</i>	74 Iowa, 740.....	508
Clay v. Powell.....	<i>Injunctions</i>	85 Ala. 538.....	70
Coenen v. Staub.....	<i>Mechanics' liens</i> ..	74 Iowa, 32.....	470
Colorado Electric Co. v. Lubbers.....	<i>Master and servant</i> ..	11 Col. 505.....	255
Commissioners ads. State.....	<i>Municipal bonds</i> ...	39 Kan. 657.....	569
Commonwealth ads. Hart.....	<i>Murder</i>	85 Ky. 77.....	576
Commonwealth ads. Hendrickson.....	<i>Murder</i>	85 Ky. 281.....	596
Commonwealth ads. Kemper.....	<i>Criminal law</i>	85 Ky. 219... ..	593
Constant v. University of Rochester.....	<i>Agency</i>	111 N. Y. 604.....	769
Continental Insurance Company v. Pearce.....	<i>Insurance</i>	39 Kan. 396.....	557
Cotton v. Carlisle.....			
Coyne v. People.....	<i>Mortgages</i>	85 Ala. 175.....	29
Coyne v. People.....	<i>Perjury</i>	124 Ill. 17.....	324
Crane v. Chicago and Northwest- ern Railway Company.....	<i>Mandamus</i>	74 Iowa, 330.....	479
Crouse v. Phoenix Insurance Co....			
Crouse v. Phoenix Insurance Co....	<i>Conflict of laws</i>	56 Conn. 176.....	298
Davidson v. Fischer.....	<i>Landl'd and tenant</i> ..	11 Col. 583	267
Davies v. Atkinson.....	<i>Partnership</i>	124 Ill. 474.....	373
Deobold v. Oppermann.....	<i>Ex'rs and adm'rs</i> ..	111 N. Y. 531.....	760
Dorrah v. Illinois Central R. R. Co.....	<i>Railroads</i>	65 Miss. 14.....	629
Dowdy v. Blake.....	<i>Vendor and vendee</i> ..	50 Ark. 205.....	88
Dowling v. Reber.....	<i>Deeds</i>	65 Miss. 259.....	651
Drennan v. Bunn.....	<i>Neg. instruments</i> ..	124 Ill. 175.....	354
Driggs and Company's Bank v. Norwood.....	<i>Husband and wife</i> ..	50 Ark. 42.....	78
Duame v. Chicago etc. R'y Co....			
Duame v. Chicago etc. R'y Co....	<i>Railroads</i>	72 Wis. 523.....	879
East Birmingham Land Company v. Denis.....	<i>Neg. instruments</i> ..	85 Ala. 56.....	73
Ellis v. State.....			
Ellis v. State.....	<i>Evidence</i>	65 Miss. 44.....	634
Estate of Newman.....	<i>Marr'ge and divorce</i> ..	75 Cal. 213.....	146
Evans v. Virgin.....	<i>Attachment</i>	72 Wis. 423.....	870
Evansville etc. R. R. Co. v. Guyton.....	<i>Master and servant</i> ..	115 Ind. 450.....	458
Ex parte O'Leary.....	<i>Nuisance</i>	65 Miss. 180.....	640
Fath v. Koepfel.....	<i>Office and officers</i> ..	72 Wis. 289.....	867
Fitzpatrick v. Hartford Life and Annuity Insurance Company.....	<i>Insurance</i>	56 Conn. 116.....	288
Frazier v. State.....			
Frazier v. State.....	<i>Criminal law</i>	85 Ala. 17.....	21
Frick v. Simon.....	<i>Adverse possession</i> ..	75 Cal. 337	177
Fuller v. Dauphin.....	<i>Boundaries</i>	124 Ill. 542.....	388
Fulton v. Short Route Railway Transfer Company.....	<i>Railroads</i>	85 Ky. 640.....	619
Furneaux v. First National Bank of Whitewater.....			
Furneaux v. First National Bank of Whitewater.....	<i>Judgments</i>	39 Kan. 144.....	541
Gerard v. Bates.....	<i>Partnership</i>	124 Ill. 150.....	350
Gerow v. Castello.....	<i>Sales</i>	11 Col. 560	260
Godfrey v. Black.....	<i>Injunctions</i>	39 Kan. 193.....	544
Greene v. Lewis.....	<i>Sales</i>	85 Ala. 221.....	42
Greenhill v. Biggs.....	<i>Co-tenancy</i>	85 Ky. 155	579

NAME.	SUBJECT.	REPORT.	PAGE.
Greer v. Wintersmith.....	<i>Executions</i>	85 Ky. 516	613
Groff v. Ankenbrandt.....	<i>Nuisance</i>	124 Ill. 51.....	342
Hafter v. Strange.....	<i>Estoppel</i>	65 Miss. 323.....	659
Hall v. Lackmond.....	<i>Executions</i>	50 Ark. 113.....	84
Hambrick v. Wilkins.....	<i>Sales</i>	65 Miss. 18	631
Hammond v. Rose.....	<i>Waters</i>	11 Col. 524.....	258
Harper v. Harper.....	<i>Fraud. conveyances</i>	85 Ky. 160.....	583
Hart v. Commonwealth.....	<i>Murder</i>	85 Ky. 77.....	576
Heilbron v. Fowler Switch Canal Company.....	{ <i>Waters</i>	75 Cal. 426.....	183
Hemmingway v. Chicago, Mil- waukee, and St. Paul R'y Co..			
Henderson v. People.....	<i>Common carriers</i> ..	72 Wis. 42.....	823
Hendrickson v. Commonwealth.....	<i>Criminal law</i>	124 Ill. 607.....	391
Heuston v. Simpson.....	<i>Murder</i>	85 Ky. 281.....	596
Hignite v. Hignite....	<i>Witnesses</i>	115 Ind. 62.....	409
Hignite v. Hignite....	<i>Co-tenancy</i>	65 Miss. 447.....	673
Home Protection of North Ala- bama v. Avery.....	{ <i>Insurance</i>	85 Ala. 348.....	54
In re Morris.....			
James v. Trustees of Harrodsburg.....	<i>Habeas corpus</i> ...	39 Kan. 28.....	512
Jean v. Hennessy.....	<i>Nuisance</i>	85 Ky. 191.....	589
Johnston v. San Francisco Sav- ings Union.....	<i>Judgments</i>	74 Iowa, 348.....	486
J. S. Keator Lumber Company v. St. Croix Boom Corporation.	{ <i>Mortgages— judgments.</i> }	75 Cal. 134.....	129
Kahn v. Edwards.....			
Keeler v. Stead.....	<i>Waters</i>	72 Wis. 62.....	837
Kemper v. Commonwealth.	<i>Stat. of limitations</i> ..	75 Cal. 192.....	141
Kernochan v. Murray.....	<i>Justices of the peace</i>	56 Conn. 501.....	320
King v. State.....	<i>Criminal law</i>	85 Ky. 219.....	593
Lauderdale County v. Alford.....	<i>Guaranty</i>	111 N. Y. 306.....	744
Leroy and Western Railway Co. v. Hawk.....	<i>Murder</i>	65 Miss. 576.....	681
Lewis v. Seibles.....	<i>Suretyship</i>	65 Miss. 63.....	637
Lindley v. O'Reilly.....	{ <i>Eminent domain</i> ..	39 Kan. 638.....	566
Lindzey v. State.....			
Little Pittsburg Con. Mining Co. v. Little Chief Con. Mining Co.	<i>Taxation</i>	65 Miss. 251.....	649
Louisville and Nashville R. R. Co. v. Ballard.....	<i>Wills</i>	50 N. J. L. 636...	802
Louisville and Nashville R. R. Co. v. Reese.....	<i>Criminal law</i>	65 Miss. 542.....	674
Louisville etc. R'y Co. v. Wright..	{ <i>Judgments</i>	11 Col. 223.....	226
Maloney v. Hefer.....			
Marmon v. Harwood.....	<i>Common carriers</i> ..	85 Ky. 307.....	600
Meeker v. Meeker.....	<i>Railroads</i>	85 Ala. 497.....	66
Meher v. Cole.....	<i>Master and servant</i>	115 Ind. 378.....	432
McDermott v. Kernan.....	<i>Homesteads</i>	75 Cal. 422.....	180
McDowell v. Chicago Steel Works.	<i>Fraud. conveyances</i>	124 Ill. 104.....	345
	<i>Wills</i>	74 Iowa, 352.....	489
	<i>Subrogation</i>	50 Ark. 361.....	101
	<i>Homesteads</i>	72 Wis. 268.....	864
	<i>Pledge</i>	124 Ill. 491.....	381

NAME.	SUBJECT.	REPORT.	PAGE.
McMaster v. Illinois Cent. R. R. Co.	<i>Master and servant.</i>	65 Miss. 264.	653
Mills v. New Orleans Seed Co.	<i>Injunctions.</i>	65 Miss. 391.	671
Mills v. Penny	<i>Boundaries.</i>	74 Iowa, 172.	474
Montgomery v. Keppel	<i>Mortgages.</i>	75 Cal. 128.	125
Moore v. Jordan	<i>Trusts.</i>	65 Miss. 229.	641
Morris, In re.	<i>Habeas corpus.</i>	39 Kan. 28.	512
Morris v. Brown	<i>Master and servant.</i>	111 N. Y. 318.	751
Murray v. Albertson	<i>Landl'd and tenant.</i>	50 N. J. L. 167.	787
Nelson, by Guardian ad Litem, v. Harrington.	<i>Physicians.</i>	72 Wis. 591.	900
Newman, Estate of.	<i>Marr'ge and divorce.</i>	75 Cal. 213.	146
New York and Colorado Mining Syndicate & Co. v. Rogers.	<i>Master and servant.</i>	11 Col. 6.	198
New York etc. R'y Co. v. Doane.	<i>Common carriers.</i>	115 Ind. 435.	451
Oberg v. Breen	<i>Evidence.</i>	50 N. J. L. 145.	779
O'Leary, Ex parte.	<i>Nuisance.</i>	65 Miss. 180.	640
Omar v. Soper.	<i>Mines.</i>	11 Col. 380.	246
Otto v. Journeyman Tailors' Pro- tective and Benevolent Union.	<i>Unincorporated societies.</i>	75 Cal. 308.	156
Outland v. Bowen	<i>Estates.</i>	115 Ind. 150.	420
Parker v. Reddick.	<i>Neg. instruments.</i>	65 Miss. 242.	646
People ads. Coyne.	<i>Perjury.</i>	124 Ill. 17.	324
People ads. Henderson.	<i>Criminal law.</i>	124 Ill. 607.	391
People v. O'Brien.	<i>Corporations.</i>	111 N. Y. 1.	684
People ex rel. Union Insurance Co. of Philadelphia v. Nash.	<i>Arbitration.</i>	111 N. Y. 310.	747
Potter's Appeal.	<i>Executors.</i>	56 Conn. 1.	272
Price v. Dime Savings Bank.	<i>Pledge.</i>	124 Ill. 317.	367
Quinn v. Dresbach.	<i>Agency.</i>	75 Cal. 159.	138
Quinn v. New York etc. R. R. Co.	<i>Negligence.</i>	56 Conn. 44.	284
Reber v. Dowling.	<i>Deeds.</i>	65 Miss. 259.	651
Reed v. Douglas.	<i>Judgments.</i>	74 Iowa, 244.	476
Ritchie v. Johnson.	<i>Ejectment.</i>	50 Ark. 551.	118
Roswald v. Hobbie.	<i>Attachment.</i>	85 Ala. 73.	23
Schalucky v. Field	<i>Corporations.</i>	124 Ill. 617.	399
Sears v. Starbird.	<i>Contempt.</i>	75 Cal. 91.	123
Shively v. Cedar Rapids etc. R'y Co.	<i>Nuisance.</i>	74 Iowa, 169.	471
Smith v. Pearce.	<i>Homesteads.</i>	85 Ala. 264.	44
Spitz's Appeal.	<i>Husband and wife.</i>	56 Conn. 184.	303
Stark v. Bare.	<i>Exemptions.</i>	39 Kan. 100.	537
State ads. Frazier.	<i>Criminal law.</i>	85 Ala. 17.	21
State ads. King.	<i>Murder.</i>	65 Miss. 576.	681
State ads. Lindzey.	<i>Criminal law.</i>	65 Miss. 542.	674
State ads. Walker.	<i>Criminal law.</i>	85 Ala. 7.	17
State v. Trout.	<i>Murder.</i>	74 Iowa, 545.	499
State ex rel. Robb v. Commis- sioners of Kiowa County.	<i>Municipal bonds.</i>	39 Kan. 657.	569

NAME.	SUBJECT.	REPORT.	PAGE.
Esterling v. Ryan	<i>Contracts</i>	72 Wis. 36.....	818
Stockton Building and Loan As- sociation v. Chalmers	<i>Husband and wife</i>	75 Cal. 332.....	173
St. Louis etc. R'y v. Harper	<i>Criminal law</i>	50 Ark. 157.....	86
St. Louis etc. R'y Co. v. Weakly	<i>Common carriers</i>	50 Ark. 397.....	104
Sullens v. Chicago etc. R'y Co	<i>Waters</i>	74 Iowa, 659.....	501
Supervisors v. Alford	<i>Suretyship</i>	65 Miss. 63.....	637
Swantz v. Pillow	<i>Replevin</i>	50 Ark. 300.....	98
Teabout v. Jaffray and Company	<i>Executions</i>	74 Iowa, 29.....	466
Teague v. Le Grand	<i>Attachment</i>	85 Ala. 493.....	64
Tierney v. Brown	<i>Deeds</i>	65 Miss. 563.....	679
Trout ads. State	<i>Murder</i>	74 Iowa, 545.....	499
Voorhis v. Terhune	<i>Executions</i>	50 N. J. L. 147...	781
Walker v. State	<i>Criminal law</i>	85 Ala. 7.....	17
Ward v. Dougherty	<i>Deeds</i>	75 Cal. 240.....	151
Watson v. Lederer	<i>Exemptions</i>	11 Col. 577.....	263
West v. Western Union Tele- graph Company	<i>Telegraphs</i>	39 Kan. 93.....	530
Whitson v. Griffis	<i>Mortgages</i>	39 Kan. 211.....	546
Williams v. Lewis	<i>Partnership</i>	115 Ind. 45.....	403
Woodall v. Kelly	<i>Vendor and vendee</i>	85 Ala. 368.....	57

AMERICAN STATE REPORTS.
VOL VII

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

WALKER v. STATE.

[85 ALABAMA, 7.]

CRIMINAL LAW — PROOF OF MOTIVE. — MOTIVE IS INFERENTIAL FACT, and may be inferred from the attendant and surrounding circumstances, in conjunction with all previous occurrences having reference to and connected with the commission of the offense.

ON TRIAL FOR ASSAULT WITH INTENT TO MURDER, IT HAVING BEEN SHOWN that the defendant and the woman injured had lived in adultery for some time, and that she left him, and the evidence tended to show that he shot her because of her persistent refusal to return and live with him, it is competent for the prosecution to prove the relation which had existed between them, the defendant's continuous efforts to induce her to return, her repeated refusals, his following her from place to place, his threats on each refusal, and his demonstrations of violence on such occasions, as bearing on the question of intent with which the assault was made.

SUBSEQUENT THREATS. — ON TRIAL FOR ASSAULT WITH INTENT TO MURDER, EVIDENCE THAT DEFENDANT, after the indictment had been found, and a few weeks before the trial, as he passed the injured woman in the court-house, said to her, "I'll get you yet," is admissible as manifesting his state of feeling towards her, not only at the time of the menace, but also at the time of the assault, and that he still cherished the malicious intent.

REMARKS OF JUDGE ON EVIDENCE, WHEN NOT REVERSIBLE ERROR. — On the trial of a prosecution for an assault with intent to murder, the court having omitted, in the general charge, to instruct the jury specifically as to the offense of assault and battery, the defendant's counsel called attention to the omission, and the presiding judge replied: "I know of no evidence in the case which would warrant a verdict for assault and battery." Such remark, in the hearing of the jury, is not reversible error, where the record discloses no evidence on which a verdict for an assault and battery only could have been reasonably found.

VOLUNTARY DRUNKENNESS IS NO EXCUSE FOR CRIME, and unless the defendant, indicted for an assault with intent to murder, was, at the time of the shooting, so drunk as to be incapable of forming an intent to take life, his being drunk can avail him nothing.

THE defendant, Walker, was indicted for an assault with intent to murder one Daisy Harris, a mulatto woman, and, upon trial and conviction, was sentenced to the penitentiary for five years. In addition to the facts set out in the opinion, Daisy Harris testified that once, in Birmingham, in the court-house, before the shooting for which the defendant was on trial, he said to her: "I will kill you, even if you were in the arms of the judge"; also, that afterwards, in the streets of Birmingham, the defendant threatened to kill her, drew his pistol on her, and ordered her to stop, but did not attempt to carry out his threats; also, that after the finding of the indictment against the defendant, and about two weeks before the trial, in the court-house in Montgomery, as the defendant passed her he said, "I'll get you yet." To each part of this evidence the defendant objected, and reserved exceptions to the overruling of his objections. There was evidence tending to show that the defendant was drunk on the morning of the shooting. The court gave the following charges to the jury, to each of which the defendant excepted: 1. "In determining whether or not the defendant had the intent to take the life of Daisy Harris, the jury may consider the facts, if they be facts, that he drew a pistol on her in Birmingham prior to the shooting here charged, and ordered her to stop; that afterwards, but before the shooting, he again threatened to take her life; and that on the morning of the shooting, he went to the office of Rice and Wiley, where she was, and there shot her with a deadly weapon, — in connection with all the other evidence in the case; and if they believe from the whole evidence, beyond a reasonable doubt, that the defendant had, at the time of the shooting, the intent to take the life of Daisy Harris, and that he shot with malice, and not in self-defense, and that this occurred last November, in Montgomery County, — then they must convict the defendant as charged"; 2. "Voluntary drunkenness is no excuse for crime; and unless the defendant was, at the time of the shooting, so drunk as to be incapable of forming an intent to take life, his being drunk cannot avail him anything"; 3. "The jury are authorized to presume malice from the use of a deadly weapon, unless the facts which establish the shooting rebut the presumption of malice; and if,

from the use of a deadly weapon, and the manner of its use, and from the threats made, if any were made, and the other evidence in the case, the jury believe, beyond a reasonable doubt, that the defendant shot Daisy Harris with malice, in November last, in this county, and shot her with the intent to take her life, and not in self-defense, — then the defendant would be guilty as charged.” The defendant also excepted to the refusal of the judge to charge as follows: “Unless the jury believe from the evidence, beyond all reasonable doubt, that the defendant shot Daisy Harris, not in the heat of passion, they cannot convict him of an assault with intent to murder.”

Thomas N. McClellan, attorney-general, for the state.

CLOPTON, J. All minor or evidentiary circumstances which tend to shed light on the intent of the defendant are admissible in evidence against him, though they may have transpired previous to the commission of the offense. Motive is an inferential fact, and may be inferred, not merely from the attendant and surrounding circumstances, but, in conjunction with these, all previous occurrences having reference to and connected with the commission of the offense. It having been shown that the defendant and the woman injured had lived in adultery for some time, and that she left him in May, 1887, and there being evidence tending to show that he shot her because of her persistent refusal to return and live with him, the relation which had existed, and the defendant's repeated and continuous efforts, growing out of such relation, to induce her to return, her repeated refusals, his following her from place to place, his threats in consequence of her continued refusal, and demonstrations of violence on such occasions, are each and all competent evidence to go to the jury, in connection with the immediate circumstances of the injury, from which may be inferred the intent with which the assault was made.

If it be said that the weight and force of some of the transactions and declarations should be regarded as weakened or lessened by the lapse of time, such probable effect is more than counteracted by the constant and frequent repetitions, continuing up to or about the time of the injury. But if entitled to little weight, they nevertheless cannot be considered incompetent or irrelevant evidence: *Johnson v. State*, 17 Ala. 618; *Hudson v. State*, 61 Id. 333; *Evans v. State*, 62 Id. 6.

The menace made by defendant in the court-house, after the indictment was found, and about two weeks before the trial, was not merely a threat having reference to the future exclusively; it also referred to a past act, and included an implied admission, in the form of a threat, of the previous attempt to kill her, and though having failed, he would yet accomplish his intention. It manifested his state of feeling towards the person whom he had seriously wounded, not only at the time of the menace, but also at the time of the assault, and that he still cherished the malicious intent. The evidence comes within the spirit and reason of the rule laid down in *Henderson v. State*, 70 Ala. 29; 45 Am. Rep. 72; and *McManus v. State*, 36 Ala. 285.

The court having omitted in the general charge to instruct the jury specifically as to the offense of assault and battery, counsel called attention to the omission. In response, the presiding judge remarked: "I know of no evidence in this case which would warrant a verdict for assault and battery." Counsel excepted to the remark of the judge, but did not state any evidence on which to base such charge, and did not request any special charge on the question. It may be conceded that, had there been any evidence on which a verdict for the minor offense could have been reasonably found, such remark in the hearing of the jury would work a reversal of the judgment. But on examination, the record, which purports to set out all the evidence, does not disclose any, unless it be the proof that the defendant was drunk a short time before the difficulty. This testimony falls far short of showing that he was so intoxicated as to incapacitate him to form the design to kill, or the intent to murder: *Morrison v. State*, 84 Ala. 405.

The charges given at the instance of the prosecution state the law in accordance with our uniform rulings: *Baker v. State*, 81 Ala. 38; *Watson v. State*, 82 Id. 10; *Storey v. State*, 71 Id. 329; *De Arman v. State*, 71 Id. 351.

We discover no error in the record.

Affirmed.

THREATS MADE BY PRISONER, ADMISSIBILITY OF IN EVIDENCE: *Hopkins v. Commonwealth*, 50 Pa. St. 9; 88 Am. Dec. 518, and note 524.

ON THE TRIAL OF ONE OF A NUMBER OF CONSPIRATORS for murder committed in the execution of the conspiracy, it is proper to admit evidence of threats made by the conspirators to kill another person who was among those against whom the combination was formed, where such threats were made

immediately after the killing of the decedent, and were followed by firing in the attempted execution of the threats, and the whole was done in the execution of the single purpose for which the mob was formed. Such evidence tends to show the desperate character of the mob, and that murder was a part of its programme: *State v. McCahill*, 72 Iowa, 111. But threats made by a co-defendant, not on trial, in the absence of the defendant, long before the commission of the crime charged, and before the period at which it is claimed a conspiracy was formed looking to its commission, are inadmissible in evidence: *Ford v. State*, 112 Ind. 373.

VOLUNTARY INTOXICATION, when it lessens accountability for crime: *Dawson v. State*, 16 Ind. 428; 79 Am. Dec. 439, and note 440; *Golliher v. Commonwealth*, 2 Duvall, 163; 87 Am. Dec. 493; *State v. Bundy*, 24 S. C. 439; 58 Am. Rep. 262. Compare *Beasley v. State*, 50 Ala. 149; 20 Am. Rep. 292; *Shannahan v. Commonwealth*, 8 Bush, 463; 8 Am. Rep. 465; *Flanigan v. People*, 86 N. Y. 554; 40 Am. Rep. 556; *State v. Trivas*, 32 La. Ann. 1086; 36 Am. Rep. 293; *Wood v. State*, 34 Ark. 341; 36 Am. Rep. 13; *Loza v. State*, 1 Tex. App. 488; 28 Am. Rep. 416; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799. The facts that the defendant is weak-minded, and that at the time of the larceny charged he was voluntarily in a state of intoxication, may be considered as bearing upon the intent, but there being no evidence of mental unsoundness, of themselves they furnish no substantive defense against a felonious taking: *Robinson v. State*, 113 Ind. 510.

If the mania, insanity, or unsoundness of mind, though produced by drunkenness, be permanent and fixed, so as to destroy all knowledge of right and wrong, then the person thus laboring under these infirmities would not be responsible: *Beck v. State*, 76 Ga. 452.

FRAZIER v. STATE.

[85 ALABAMA, 17.]

CRIMINAL LAW. — **TO CONSTITUTE OFFENSE OF LARCENY**, there must be a wrongful taking possession of the goods of another, with the intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion, so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent. But the caption may be constructive, as when possession is obtained by trick, fraud, or deception.

DEFENDANT MAY BE CONVICTED OF LARCENY OF WHICH HE IS CHARGED, where, having shot and killed a hog with felonious intent, he covered it with pine-tops in order to conceal it until he could return and secretly remove it, and subsequently did remove it, in pursuance of the previous felonious intent, though the removal was with the consent of the owner, such consent being procured by intentional misrepresentation and deception.

IT IS NOT ERROR TO REFUSE CHARGE REQUESTED BY DEFENDANT IN CRIMINAL CASE, CLAIMING an acquittal on a hypothetical statement of certain facts, and ignoring other material facts which there was evidence tending to prove.

INDICTMENT for the larceny of a hog. It appeared that some time prior to the indictment the defendant went into the field of one Sheffield, and shot and killed the hog in a pine-thicket in the field and covered it with pine-tops; that afterwards, on the evening of the same day, the defendant, with others, went to Sheffield, the owner of the hog, and told him that they had found one of his hogs killed in his field, designating the place. Sheffield asked the defendant if the hog was spoiled, and he answered that he thought it was. Sheffield then told the defendant that he reckoned it would do for soap-grease, and that they might have one half of it if they would clean it, which they promised to do. On the next morning, Sheffield went to the defendant's house, found the hog then cleaned, examined it, found it perfectly sound, and carried it home. The defendant requested the following charge: "If the jury believe from the evidence that the defendant killed Mr. Sheffield's hog by shooting him with a gun, and that he did not move the hog after it was killed, then they must acquit the defendant of the larceny." The court refused to give this charge, and the defendant excepted.

Thomas N. McClellan, attorney-general, for the state.

CLOPTON, J. It has been held that to shoot and then chase a hog with felonious intent, over which the defendant was prevented from acquiring dominion, is not a sufficient caption and asportation to constitute larceny: *Wolf v. State*, 41 Ala. 412. On the other hand, a charge has been held to be correct which instructed the jury that if the defendant shot and killed and then took hold of the hog and cut its throat, this would constitute a taking and carrying away in the meaning of the law: *Croom v. State*, 71 Id. 14. It is said generally that to constitute the offense, there must be a wrongful taking possession of the goods of another with the intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent. The caption may be constructive, as when possession is obtained by trick, fraud, or deception.

If the defendant shot and killed the hog, with the larceny of which he is charged, in a pine-thicket in the field, with felonious intent, and covered it with pine-tops in order to conceal it until he could return and secretly remove it, and if he

subsequently removed it in pursuance of the previous felonious intent, there was, in the legal acceptance of the terms, a taking and carrying away sufficient to complete the offense, though the removal may have been with the consent of the owner, if such consent was procured by intentional misrepresentation and deception: *State v. Wilkerson*, 72 N. C. 376; *Fulton v. State*, 13 Ark. 168. The charge requested by the defendant ignored these material facts, which there was evidence tending to prove, and was misleading. There is no error in its refusal.

Affirmed.

LARCENY DEFINED: *Commonwealth v. Eichelberger*, 119 Pa. St. 254; 4 Am. St. Rep. 642, and note 645.

TAKING ANIMAL FROM STABLE, AND KILLING AND LEAVING IT ON OWNER'S PREMISES, IS LARCENY: *Deik v. State*, 63 Miss. 77; 60 Am. Rep. 46. Compare *Wilson v. State*, 18 Tex. App. 270; 51 Am. Rep. 309, and note 312. But enticing a hog for twenty yards on the owner's premises by dropping corn, and then abandoning it, is not larceny: *Edmonds v. State*, 70 Ala. 8; 45 Am. Rep. 67.

Where property has been secretly and clandestinely taken, no other motive appearing, the inference may properly arise that it was taken feloniously; and if the taking was felonious in the first instance, repentance, no matter how soon it may have followed, may mitigate but will not annul the offense: *Robinson v. State*, 113 Ind. 510.

ROSWALD v. HOBBIE.

[85 ALABAMA, 73.]

ATTACHMENT — ESTOPPEL BY REPLEVY BOND. — WHEN ATTACHED PROPERTY HAS BEEN REPLEVIED, and the liability of the bondsmen has become fixed by a proper demand and return of forfeiture on the bond, they are estopped from denying the liability of the property to the process, or from setting up any adversary claim to it.

INTERPOSING STATUTORY CLAIM. — ATTACHED PROPERTY HAVING BEEN DELIVERED TO BONDSMEN on the execution and approval of a replevy bond, they cannot interpose a valid statutory claim to the property while so retaining possession, but must first restore its control to the attaching officer, and may then assert any claim to it which they could have asserted before the execution of their bond. If, however, the bondsmen make the statutory affidavit and execute a claim bond, which the attaching officer accepts and approves, having accepted the replevy bond on the day preceding, it is not error to overrule a motion to strike the claim proceeding from the files, although the officer was not momentarily placed in the actual or constructive possession of the goods.

EVIDENCE OF VALUE OF GOODS INVOLVED IN ATTACHMENT SUIT SHOULD BE RECEIVED, if offered by either party; but its rejection could not harm plaintiffs in attachment who failed to obtain a judgment, and is not error of which they can complain.

VALUE OF GOODS ATTACHED AS FIXED IN CLAIM BOND is the *ex parte* work of the sheriff, and does not conclude either party. But an inventory of the goods, made by the sheriff who levied an attachment on them, is admissible as evidence, in connection with his oral testimony, as tending to show the value of the goods.

BURDEN OF PROOF. — SALE OF GOODS MADE BY KNOWN INSOLVENT DEBTOR, GIVING PREFERENCE to one creditor to the prejudice of others, casts on the preferred creditor the burden of proving that the goods were acquired in absolute purchase, and at a price not materially disproportionate to their fair market value; but he is not bound to negative the reservation of a benefit to the debtor.

STATUTORY trial of the right of property, between Roswald and Stoll, plaintiffs in attachment, against D. W. Rawlinson, former owner of the property, and Hobbie and Teague, as claimants. Other material facts appear in the opinion. The plaintiffs excepted to the refusal of the court to give the following charge: 1. "The plaintiffs having proved that Rawlinson was indebted to them at the time the attachment was sued out, and the transaction between the said Rawlinson and claimants, sought to be established as a sale, being assailed by plaintiffs, the burden is upon the claimants to show that said transaction was supported by an adequate and valuable consideration, is honest, and without benefit to Rawlinson."

Rice and Wiley, and Doster and Abney, for the appellants.

Thorington and Smith, contra.

STONE, C. J. The present suit was what is known in our jurisprudence as a trial of the right of property. Rawlinson had formerly owned the merchandise which is the subject of the controversy, and the testimony leaves but little, if any, doubt that both appellants and appellees were creditors. Roswald and Stoll sued out an attachment against Rawlinson, which was levied on the merchandise about ten o'clock, A. M., December 20, 1886. The claim of Hobbie and Teague is, that, earlier on the same morning, Rawlinson sold and conveyed the goods to them in payment of the debt he owed them, delivered them, and that they were in the possession of their agent when the levy was made. No question appears to have been made on the sufficiency of the consideration.

On the same day the attachment was levied, the agent of Hobbie and Teague, in their name, executed a replevy bond, conditioned, if defendant failed in the action, to return the specific property in thirty days. The bond conforms to the provision of the statute: Code of 1886, sec. 2964 (3289).

Thereupon the sheriff restored the property to claimants. On the next day, December 21, 1886, the claimants, Hobbie and Teague, through their agent, made affidavit that they had a just claim to the property levied on, and executed a claim bond in conformity with sections 3004 (3341), 3012 (3290), Code of 1886. This claim bond and affidavit were, on the day of their date, tendered to the sheriff, and the replevy bond demanded, that it might be canceled. The sheriff declined to surrender the replevy bond, but we are not informed what reason he gave, if any. He accepted the claim bond, however, approved it, and returned both bonds and the affidavit of claim to the court.

At the return term, Roswald and Stoll moved the court to strike the claim affidavit and bond from the file, on the ground that they were improperly received after the goods had been replevied, and the goods obtained and held by the claimants themselves under such replevy bond, and to dismiss said claim proceeding out of court. The court overruled the motion, and ruled that Roswald and Stoll should tender an issue with a view to the trial of the right of property. To this ruling plaintiffs excepted.

In *Braley v. Clark*, 22 Ala. 361, as in this case, property was attached, and a replevy bond was given by a stranger to the record. Judgment was obtained in the attachment suit, execution placed in the hands of the sheriff, and he demanded of the bondsmen a return of the property. The demand not being complied with, he returned the bond forfeited. The principal in the replevy bond thereupon interposed his affidavit and bond, claiming the property as his own. The circuit court allowed the claim, but this court reversed its ruling on the ground that the claim came too late. The language of this court was, that "to authorize such claim, the property must either be in the actual or constructive possession of the officer of the law under process. In the case under consideration, it had been taken out of his possession by the defendant in error, under the replevy bond, and by him retained when demanded by the sheriff. It is true, he might, under the condition of his bond, surrender the slave to the sheriff in discharge of his liability; and having thus placed it in the custody of the officer, he could, if he were disposed to do so, interpose his claim and try the right to it. But having elected to forfeit the condition of his bond," etc., he lost his right to interpose his claim. It will be observed that, in this case, no attempt

was made to assert the claim until after the replevy bond had been returned forfeited. Nor had the sheriff accepted the claim bond until ordered to do so by *mandamus* from the circuit court.

Cooper v. Peck, 22 Ala. 406, is only part and parcel of substantially the same case as that above considered. The same property, a slave, was attached as the property of the same defendant in each case. In this last case it was shown that the slave had died before the sheriff made demand of his return under the replevy bond, and the offer to institute the claim suit was made at the time the sheriff demanded the return of the slave. The sheriff refused to accept the affidavit and bond offered, and indorsed the replevy bond forfeited. An execution was thereupon issued on the forfeited bond, which the sheriff was proceeding to collect. Under a petition filed for the purpose, the circuit court ordered the sheriff to accept the claim affidavit and bond, and quashed the execution issued on the forfeited replevy bond. This court reversed his decision, saying "that the condition of a replevy bond can only be complied with by a delivery of the property replevied to the sheriff, on his demand, after judgment against the defendant in attachment. The tender of the bond to try the right of property replevied, when the property itself is withheld from the sheriff, is a breach of the condition of the bond, and justifies the sheriff in returning it forfeited."

In *Rhodes v. Smith*, 66 Ala. 174, speaking of the liability of a bondsman on a replevy bond, and the means of relieving himself, this court said: "If the title resides in him, and the defendant is without an interest therein subject to levy, this will not excuse him from performance of the condition of the bond. The redelivery of the goods, to answer the levy of the writ, is the duty to which the bond obliges him. When he has redelivered them, he may then interpose a claim to them, and demand a trial of the right of property." See also *Munter v. Leinkauff*, 78 Ala. 546; *Mead v. Figh*, 4 Id. 279; 37 Am. Dec. 742; *Mitchell v. Ingram*, 38 Ala. 395; *Adler v. Potter*, 57 Id. 571; *Brown v. Hamil*, 76 Id. 506; *Woolfolk v. Ingram*, 53 Id. 11.

Our rulings have certainly settled these propositions: 1. That when attached property has been replevied, and the liability of the bondsmen has become fixed by a proper demand, and indorsement of the bond "forfeited," the bondsmen are estopped from denying the liability of the property to the process, and from setting up any adversary claim to it; 2.

When attached property has passed from under the control of the attaching officer on the execution and approval of a replevy bond, so long as the property remains out of his control, the bondsmen, at least, can interpose no valid claim to it under the statute; 3. Until the liability of the bondsmen is fixed by a refusal to deliver the property to the officer, the bondsmen may restore the control of the property to him, and may then assert any claim to it which they could have asserted before the execution of the replevy bond.

We think the circuit court did not err in overruling the motion to strike the claim proceeding from the file. True, there was no formal surrender of the possession of the goods to the sheriff, but the sheriff is not shown to have made any point on that. He accepted the affidavit of claim, and approved the claim bond offered. This estopped the claimants from denying that they acquired the possession and held it under the claim bond. If the sheriff had been placed in possession of the property, he would have retained it only long enough to approve the bond, when it would have passed instantly back to the claimants. If the possession acquired under the replevy bond had been tendered to the sheriff, and simultaneously a sufficient affidavit of claim and sufficient claim bond had been tendered to him, he would have no authority to refuse either. Had he done so, on proper application a *mandamus* would have been awarded, compelling him to accept the redelivery of the goods, to receive the affidavit of claim, and to consider the sufficiency of the sureties offered on the claim bond; and if found sufficient, he would have been compelled to approve the claim bond, thus annulling the replevy bond, and inaugurating proceedings for a trial of the right of property. Now, what is the difference between the case supposed and the case we have in hand? Merely the unsubstantial, fruitless ceremony of placing the sheriff for a moment in the actual or constructive possession of the goods. The law has regard for the substance, not the empty forms of things. This case is distinguishable from our former rulings, which merely hold that when the liability of the bondsmen has become fixed by a failure to deliver according to the stipulations of the bond, or until after it has become impossible to restore the property to the sheriff's possession, it then becomes a statutory judgment, and precludes all denial that the property is subject to the attachment or execution under which it was seized.

The present case being a trial of the right of property, if the verdict had been for the plaintiffs it would have been the duty of the jury to assess the value of the property levied on: *Townsend v. Brooks*, 76 Ala. 308. To do so, the jury must have had testimony as to the value. Plaintiffs proved by the sheriff that when he attached the goods, he made an inventory of them, affixed a value to the several articles which was shown by the inventory, and which, in his opinion, was the "reasonable market values of the said goods, wares, and merchandise." This inventory was offered in evidence by plaintiffs, in connection with and as part of the oral testimony. Claimants objected "upon the ground that the said claim bond fixed the measure of the value of the goods." The court sustained the objection.

It is manifest that the ground stated by the counsel for excluding the evidence was indefensible. The value fixed in the claim bond is the *ex parte* work of the sheriff, and does not conclude either plaintiffs or claimants. It is not evidence on which a jury can act in assessing the value of property condemned to the satisfaction of an execution or attachment. Pending the trial, when the result of the suit cannot be known, the evidence of value should be received, if offered by either party. But the ruling in this case, considered in reference to the phase of the question we have been considering, did the appellants no harm. They failed to obtain a condemnation of the property, and hence assessed value did not become an element of the verdict. But this question has another phase. Hobbie and Teague made claim under a purchase of the merchandise, the sole consideration being an indebtedness from Rawlinson, the defendant in attachment. This sale, made by a known insolvent debtor, giving a preference to one creditor to the prejudice of others, cast on the preferred creditor the duty and burden of proving that the goods were acquired in absolute purchase, and at a price not materially disproportionate to their fair market value: *Crawford v. Kirksey*, 55 Ala. 282; 27 Am. Rep. 704; *Hodges v. Coleman*, 76 Ala. 103. Proof of the value of the merchandise should have been received on this phase of the inquiry. The form in which the testimony was offered was free from objection: *Hirschfelder v. Levy*, 69 Id. 351; *Mooney v. Hough*, 84 Id. 80.

The first charge asked by plaintiff was rightly refused. The duty was on Hobbie and Teague to prove that their purchase was on a "valuable and adequate consideration," but not to

prove the negative, — that no benefit was reserved to Rawlinson. The laboring oar on that negative proposition was with Roswald and Stoll.

We find but the one error in this record.

Reversed and remanded.

WHERE ANSWER IN REPLEVIN DOES NOT DENY VALUE OF PROPERTY alleged in complaint, evidence as to its value should not be admitted: *Tully v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102.

EVIDENCE AS TO KIND OR QUALITY OF PROPERTY IN DISPUTE IS ADMISSIBLE for plaintiff in replevin as a means of showing its value: *Jenkins v. Steanka*, 19 Wis. 126; 88 Am. Dec. 675.

VALUE OF ARTICLES CONTAINED IN RECEIPT GIVEN TO OFFICER FOR PROPERTY ATTACHED by him is conclusive upon both parties to such receipt: *Remick v. Atkinson*, 11 N. H. 256; 35 Am. Dec. 493.

WHEN DEED IS ATTACKED FOR FRAUD, AND GRANTEE PLEADS that he is a *bona fide* purchaser for value, such plea is an affirmative defense, casting the burden of proof on him, and the plaintiff need only show the fraudulent intent and purpose of the grantor: *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162, and note 168.

COTTON v. CARLISLE.

[85 ALABAMA, 175.]

MORTGAGES. — BETWEEN PARTIES, MORTGAGE TRANSFERS LEGAL TITLE, defensible on performance of the conditions and the right of immediate possession, unless by its terms possession is reserved in the mortgagor for an unexpired term. As to the mortgagee, the mortgagor has only an equity, but as to all persons except the mortgagee and those claiming in his right, the mortgagor is the owner of the fee, and has title under which he may maintain ejectment against strangers who have no connection with the title of the mortgagee, and the defendant in ejectment will not be allowed to set up such outstanding title to defeat the action.

UNDER PROVISION OF ALABAMA CODE OF 1886, SECTION 2892, that "when any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities," a purchaser of the equity of redemption in mortgaged lands, at execution sale against the mortgagor, acquires a title on which he may maintain ejectment to recover possession from the mortgagor, who cannot defeat the action by setting up the outstanding title of the mortgagee.

EXECUTIONS. — GENERAL RULE IS, THAT PURCHASER AT EXECUTION SALE ACQUIRES whatever estate and interest the defendant in execution owns and possesses, and succeeds to his title and rights, including the right of possession.

ACTION in the nature of ejectment, brought by M. N. Carlisle against G. J. Cotton, to recover the possession of a certain tract of land. The plaintiff claimed under a purchase at

sheriff's sale under execution against said Cotton, and produced the sheriff's deed, which was admitted in evidence. The defendant offered in evidence two mortgages on the land, executed by himself and wife. The question presented for decision is stated in the opinion. Verdict and judgment for the plaintiff, and the defendant appealed.

Parks and Son, for the appellant.

M. N. Carlisle, contra.

CLOPTON, J. As stated in the bill of exceptions, the only question presented for decision is, whether a mortgagor in possession can set up the outstanding title of the mortgagee to defeat an action of ejectment brought by a purchaser of the equity of redemption, at a sale under execution against the mortgagor. The sale under an execution against the defendant, issued on a valid judgment, the purchase by and the sheriff's conveyance to appellee, who brings the action, and the mortgages made by the defendant prior to the rendition of the judgment, are conceded facts. Defendant insists that the title and estate of the mortgagor is equitable, and will not support the action of ejectment, in which only the legal estate and right of possession are involved. The cases of *Childress v. Monette*, 54 Ala. 317, and *Atcheson v. Broadhead*, 56 Id. 414, are cited and relied on to support the contention on the part of defendant. In the opinion delivered in the first of these cases, there are expressions to the effect that the statute subjecting an equity of redemption to sale under execution does not convert the equity into a legal estate, authorizing the purchaser to maintain or defend ejectment, and that his right can be asserted and enforced only in equity; and in the second case it was held, on the authority of the first, that a purchaser of the equity of redemption, after the maturity of the mortgage, did not acquire a title on which he could maintain a real action to recover possession. These cases are irreconcilable with the later rulings, and, as against them, are not now regarded as authority in respect to the kind and character of the estate of a mortgagor in possession. In *Marks v. Robinson*, 82 Ala. 69, they were considered, explained, and qualified, in conformity with the latter cases.

Between the parties, the mortgage transfers the legal title, defeasible on performance of the conditions, and the right of immediate possession, unless by its terms possession is reserved in the mortgagor for an unexpired term. As to the

mortgagee, the mortgagor has only an equity; but it has been uniformly ruled in all the later cases, and may now be regarded as settled, that, as to all persons except the mortgagee and those claiming in his right, the mortgagor is the owner of the fee, and has title under which he may maintain ejectment against strangers who have no connection with the title of the mortgagee, and will not be allowed to set up such outstanding title to defeat the action: *Allen v. Kellam*, 69 Ala. 442; *Denby v. Mellgrew*, 58 Id. 147. These principles are reiterated, reaffirmed, and emphasized in *Marks v. Robinson*, *supra*, which is the latest judicial expression on this question.

The general rule is, that a purchaser at execution sale acquires whatever estate and interest the defendant in execution owns and possesses, and succeeds to his title and rights, including the right of possession. The statute which subjects an equity of redemption to levy and sale under execution expressly affirms the general rule in such case. It declares: "When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities": Code 1886, sec. 2892. He acquires the equity of redemption as against the mortgagee, and as to the mortgagor and all other persons except the mortgagee and those succeeding to his rights, whatever title and estate, legal or equitable, the mortgagor may have. From the effect of the statute, and the foregoing principles, it necessarily follows that such purchaser may maintain an action at law to recover possession from the mortgagor, who will not be permitted to defeat the action by setting up the outstanding title of the mortgagee, with which he has no connection other than as mortgagor.

Affirmed.

INTEREST ACQUIRED BY PURCHASER AT SHERIFF'S SALE UNDER EXECUTION: *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429, and note 433.

NATURE OF MORTGAGOR'S ESTATE AT COMMON LAW, AND THE REMEDIES AVAILABLE BY HIM TO RECOVER POSSESSION OR OTHERWISE OBTAIN HIS RIGHTS BY SUIT OR ACTION. — The relation of mortgagor and mortgagee is peculiar, and the decisions touching the rights and interests of each are not entirely harmonious. It is said to be "very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words": Lord Denman, in *Doe v. Barton*, 11 Ad. & E. 314; and see *Doe v. Williams*, 5 Id. 291; *Litchfield v. Ready*, 5 Ex. 939. Besides, a mortgage is treated differently in the two leading jurisdictions, — equity and common law. In equity it is but a security for the payment of a debt or the performance of some duty, the

debt or obligation being deemed the principal thing and the mortgage as only the incident: *Blackwell v. Barnett*, 52 Tex. 326; and in several of the states a mortgage is thus regarded, both at law and in equity: *Id.*; *Vason v. Ball*, 56 Ga. 268; *McHugh v. Smiley*, 17 Neb. 620; *Mack v. Wetzelar*, 39 Cal. 247; *Berlack v. Halle*, 22 Fla. 236; *Brinkman v. Jones*, 44 Wis. 510; *Hubbel v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519. But at common law a mortgage of real estate is regarded as a conveyance in fee. It is defined to be an estate upon condition, defeasible by the performance of the condition according to its legal effect: *Erskine v. Townsend*, 2 Mass. 495; and see *Mitchell v. Burnham*, 44 Me. 299; *Wing v. Cooper*, 37 Vt. 179; *Gibson v. Martin*, 38 Ark. 212; and in the earlier period of the common law, if the condition was not strictly performed, the estate in the mortgagee, at first conditional, became absolute, and the mortgagor was without remedy. The estate or interest, though defeasible at its inception, became unconditional on a failure of the mortgagor to pay the money secured, or fulfill the condition at the time appointed for the performance: *Brobst v. Brock*, 10 Wall. 529; *Parsons v. Welles*, 17 Mass. 421; *Lansing v. Golet*, 9 Cow. 401; *Hagar v. Brainerd*, 44 Vt. 294. To remedy this hardship, the court of chancery was induced to interfere and grant relief upon the payment of the mortgage debt, with interest, within a reasonable time. And this right, called the "equity of redemption," is now a necessary incident to every mortgage: See *Johnston v. Gray*, 16 Serg. & R. 361; 16 Am. Dec. 577; *Quartermans v. Kennedy*, 20 Ark. 544; *Wilmerding v. Mitchell*, 42 N. J. L. 476; *Chapin v. Wright*, 41 N. J. Eq. 438, 445; *Parsons v. Welles*, 17 Mass. 421; *King v. Warrington*, 2 N. Mex. 318; *Hemphill v. Ross*, 66 N. C. 477. A mortgage at common law is, however, as between the parties or their privies, a transfer of the legal title, leaving in the mortgagor only a right to redeem: *Marks v. Robinson*, 82 Ala. 69, 77. The legal estate passes to the mortgagee, subject to be defeated by performance of the conditions of the mortgage, and the right of possession follows the legal title, unless controlled by stipulations in the deed, or the apparent intention of the parties: *Terry v. Rosell*, 32 Ark. 478; *Whittington v. Flint*, 43 Id. 504; 51 Am. Rep. 572; *Toomer v. Randolph*, 60 Ala. 356; *Harper v. Ely*, 70 Ill. 581; *Stewart v. Barron*, 7 Bush, 368; *Sumwalt v. Tucker*, 34 Md. 89; *Hobart v. Sanborn*, 13 N. H. 226; *Tripe v. Marcy*, 39 Id. 439; *Tryon v. Munson*, 77 Pa. St. 250; *Vance v. Johnson*, 10 Humph. 214; *Carpenter v. Carpenter*, 6 R. I. 542; *Jones v. Smith*, 79 Me. 446. The title of the mortgagee will dominate that of the mortgagor in any contest between them or their privies in estate: *Marks v. Robinson*, 82 Ala. 69. And in Illinois, as in England, the mortgagee of lands is held in law to be the owner of the fee, having the *jus in re* as well as *ad rem*, and entitled to all the rights and remedies which the law gives such owner: *Carroll v. Balance*, 26 Ill. 17; 79 Am. Dec. 354; *Oldham v. Pfeiffer*, 84 Ill. 102; *Finlon v. Clark*, 118 Id. 32.

Nevertheless, it is said that a mortgagee is not, in a general sense, the owner of the mortgaged estate. Before foreclosure, his interest is not, in fact, real estate, but he is entitled to have it treated as such so far as it may be necessary to enable him to prevent waste, and to keep the land from being in any way diminished in value. He is to be regarded as having the legal estate for the purpose of all lawful protection of his interests, but for all other purposes the mortgage is, in general, held to be a mere security: *Ellison v. Daniels*, 11 N. H. 274; *Smith v. Moore*, 11 Id. 55; *Fletcher v. Chamberlin*, 61 Id. 438, 478; and see *Steel v. Steel*, 4 Allen, 417; *Hapgood v. Blood*, 11 Gray, 400; *Norcross v. Norcross*, 105 Mass. 265; *Shields v. Lozeau*, 34 N. J. L. 496; 13 Am. Rep. 519; *Woodside v. Adams*, 40 N. J. L. 417; *Allen*

v. *Everly*, 24 Ohio St. 97. As to the rest of the world, except the mortgagee and those claiming under him, the entire estate is in the mortgagor or owner of the equity of redemption: *Wilkins v. French*, 20 Me. 111; *Buck v. Payne*, 52 Miss. 271; *Rands v. Kendall*, 15 Ohio, 671; *Farnsworth v. Boston*, 126 Mass. 3. Before the extinguishment of the mortgage lien, the mortgagor in possession, whether before or after forfeiture, is the general owner of the freehold, having the legal title; while the mortgagee and those claiming in his right, whether the title be abstractly good or not, have, as against the mortgagor and all claiming in his right, all the attributes of a legal title necessary to recover and hold the property mortgaged: *Marks v. Robinson*, 62 Ala. 69, 78. So long as the mortgagee permits the mortgagor to remain in possession of the mortgaged estate, he is regarded as owner so far only as may be necessary for the protection of his security. He may employ any remedies appropriate for that purpose, and may at any time enter and take possession under his mortgage, but, until he chooses to take possession, the mortgage gives him no right to do any act whereby the mortgagor may be disturbed in his enjoyment of the estate, or its value and earnings may be diminished: *Great Falls Co. v. Worster*, 15 N. H. 412; *Vaugh v. Wetherell*, 116 Mass. 138; *Morse v. Whitcher*, Sup. Ct. N. H., 1888; see also *Orr v. Hadley*, 36 N. H. 579; *Hughes v. Edwards*, 9 Wheat. 489; *Whiting v. New Haven*, 45 Conn. 303; *Kimball v. Lewiston Steam Mill Co.*, 55 Me. 499; *State v. Raglund*, 75 N. C. 12; *Greer v. Turner*, 36 Ark. 17; *Anderson v. Strauss*, 98 Ill. 485. The mortgagor and his assigns hold the mortgaged realty in privity with the mortgagee, and in subordination to his rights: *Doyle v. Melten*, 15 R. I. 523; *Whittington v. Flint*, 43 Ark. 504; 51 Am. Rep. 572; *Jordan v. Sayre*, Sup. Ct. Fla., 1888.

As to all rights and privileges, both civil and political, of which the ownership of a freehold is one of the conditions, the mortgagor is the freeholder of the mortgaged premises, and may maintain a real action to recover possession as against all persons except the mortgagee, and those claiming under him: *Bird v. Decker*, 64 Me. 550; *White v. Rittenmyer*, 30 Iowa, 268; *Runyan v. Mersereau*, 11 Johns. 534; 6 Am. Dec. 393; *Hall v. Lance*, 25 Ill. 277; and it is no defense to such action that the legal title is in the mortgagee, and the law day of the mortgage has arrived: *Id.*; *Allen v. Kellam*, 69 Ala. 442; *Hardwick v. Jones*, 65 Mo. 54, 60; *Savage v. Dooley*, 28 Conn. 411; *Doton v. Russell*, 17 Id. 146. But according to the prevailing doctrine, neither a mortgagor nor his assignee of the equity of redemption can maintain a real action against the mortgagee or his assignee: *Johnson v. Elliott*, 26 N. H. 67; *Wells v. Rice*, 34 Ark. 346; *Connor v. Whitmore*, 52 Me. 185; *Doe v. Tunnell*, 1 Houst. 320; *Brobst v. Brock*, 10 Wall. 529; *Moulton v. Leighton*, Cir. Ct. Minn., 1887; *Johnson v. Sandhoff*, 30 Minn. 201; *Beach v. Cooke*, 28 N. Y. 508; *Hubbell v. Moulson*, 53 Id. 225; 13 Am. Rep. 519. His remedy to recover possession of the mortgagee after the mortgage debt has been paid is in equity by a bill to redeem: *Chapin v. Wright*, 41 N. J. Eq. 438, 445; *Rowell v. Jewett*, 69 Me. 293; *Woods v. Woods*, 66 Id. 206; *Doe v. Tunnell*, 1 Houst. 320; *Posten v. Miller*, 60 Wis. 494. This right to redeem is a pure equity, cognizable alone by courts of equity, and a mortgagor can assert it in no other forum: See *Chapin v. Wright*, 41 N. J. Eq. 445; *Henry v. Davis*, 7 Johns. Ch. 40; *Linnell v. Lyford*, 72 Me. 280. Moreover, in the absence of an express statute changing the rule, the right to redeem is barred after twenty years' uninterrupted possession of the mortgaged premises by the mortgagee under his mortgage, without any acknowledgment by him in the mean while that his term is as mortgagee: *Chapin v. Wright*, 41 N. J. Eq.

438; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; 8 Am. Dec. 467; *Locke v. Caldwell*, 91 Ill. 417; *Crook v. Glenn*, 30 Md. 55; *Johnson v. Mounsey*, L. R. 11 Ch. Div. 284. His holding is adverse to the mortgagor, and if acquiesced in for the period of limitations for actions at law, it bars the mortgagor of all relief, legal and equitable (*Marks v. Robinson*, 82 Ala. 77), unless he can bring himself within some one of the disabilities of the statute of limitations: *Clark v. Potter*, 32 Ohio St. 49; *Hall v. Denckla*, 28 Ark. 506; *Snively v. Pickle*, 29 Gratt. 27; *Hanford v. Fitch*, 41 Conn. 486; *Whalley v. Eldridge*, 24 Minn. 358; *Anding v. Davis*, 38 Miss. 574. In Pennsylvania, however, a mortgagor may bring ejectment against a mortgagee in possession, and the action is governed by the same equitable principles which apply in the case of a bill in equity to redeem: *Wells v. Van Dyke*, 109 Pa. St. 330. And under peculiar provisions of statute in some of the states, a mortgagor may recover the possession from his mortgagee at any time before his rights have been foreclosed: *Humphrey v. Hurd*, 29 Mich. 44; and see *Morrow v. Morgan*, 48 Tex. 304; *Mills v. Heaton*, 52 Iowa, 215.

Since, at common law, a mortgagee of land has the right of immediate possession of the mortgaged premises, unless it is otherwise agreed between him and the mortgagor, it is held that an action of trespass *quare clausum* will not lie in favor of the mortgagor against the mortgagee or his assignee for entering peaceably upon the mortgaged premises, and digging up and carrying away and converting to his own use portions of the soil: *Furbush v. Goodwin*, 29 N. H. 321; nor for removing fixtures belonging to the real estate: *Chellis v. Stearns*, 22 Id. 312; and see *Jones v. Smith*, 79 Me. 446; nor for entering and harvesting the crops, unless the mortgagor is occupying under an agreement as tenant of the mortgagee: *Gilman v. Wills*, 66 Id. 273. In such cases, the mortgagee's right of entry under his mortgage is a justification of the charge of breaking and entering, and consequently is an answer to the whole action: *Chellis v. Stearns*, 22 N. H. 312, 315. But for injuries done by the mortgagee before entry, as where he diverts a natural stream of water from the mortgaged premises, or causes to be deposited thereon any substance injurious to the land or to the crops growing thereon, the mortgage affords no protection against a claim for damages, and he is liable therefor in an action by the mortgagor, notwithstanding the mortgage: *Morse v. Whitcher*, Sup. Ct. N. H., 1888; and see *Great Falls Co. v. Worster*, 15 N. H. 445; *Vaugh v. Wetherell*, 116 Mass. 138.

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee: *Fairclough v. Marshall*, L. R. 4 Ex. 37; 31 Eng. R. 337.

BIRMINGHAM WATER-WORKS COMPANY v. HUBBARD.

[85 ALABAMA, 179.]

MASTER AND SERVANT — LIABILITY OF MASTER FOR SERVANT'S NEGLIGENCE. — IN ACTION TO RECOVER FOR INJURIES SUSTAINED BY PLAINTIFF from an explosion of powder and dynamite, accidentally caused by sparks thrown from his anvil while working in his blacksmith-shop, where the explosives had been stored, against his objection, by the defendant's foreman, to preserve them from the rain, the charges of the court, that if the act of the foreman in placing the explosives in the shop was so done with the *bona fide* purpose of preserving them, and in that way furthering the interest of his employer, then the latter would be liable, but otherwise if it was done by the foreman for a purpose of his own, fairly and correctly state the law.

Id. — IN SUCH CASE, QUESTION WHETHER PLAINTIFF WAS GUILTY of contributory negligence in failing to ascertain if the explosives had been removed, before going into the shop to work with fire on the day of the accident, was properly submitted to the jury.

ACTION for damages for personal injuries brought by Armstead Hubbard against the Birmingham Water-Works Company. The material facts appear in the opinion. The court charged the jury as follows, at the plaintiff's request: 1. "If Bennefield was in the employment of the defendant, and was by it intrusted with the use and care of the powder and dynamite, in determining whether his act in placing and leaving the powder in the shop was within the scope of his employment, the jury will consider whether it was done with the *bona fide* purpose of preserving the powder, and in that way furthering the interest of the defendant; and if the jury so find, then the act of Bennefield in placing the powder and dynamite in the shop was within the scope of his employment, and was the act of the defendant." 2. "That if said Bennefield placed the powder in the shop for a purpose of his own, then that would be an individual act, and the jury should find that he was not acting within the scope of his employment." 3. "That contributory negligence, in order to avail the defendant, must not only be a want of ordinary care on the part of the plaintiff, but there must further be a proximate connection between this want of ordinary care and the injury." To these several charges the defendant excepted, and also to the refusal of the following charge: 4. "If the jury find from the evidence that the plaintiff knew the powder and dynamite were in the shop, and told Bennefield to take it away, then, as an ordinarily prudent man, it was his duty himself to make inquiry and ascertain if the powder and dynamite had been removed,

before going into the shop to work with fire." The defendant assigned error.

Ward and Head, for the appellant.

J. M. McMaster, contra.

SOMERVILLE, J. The plaintiff was seriously injured by the accidental explosion of a quantity of powder dynamite and powder cartridges which had been stored without permission in a blacksmith-shop, where the plaintiff was accustomed to work for the owner of the shop, one Haynes. The explosive material had been placed there the day previous, for preservation from damage by rain, by the act of one Bennefield, who was employed by the defendant company as foreman or superintendent of a number of men who were engaged in the company's service to blast stone from a neighboring quarry. The plaintiff had expostulated with Bennefield about the matter, and he had promised to remove the powder before the commencement of work in the shop that day. The explosion occurred through sparks of fire thrown by scintillation from the anvil during the progress of work in the shop.

It is contended in behalf of the defendant corporation, against which verdict and judgment for the sum of five hundred dollars were rendered in the court below, that the act of Bennefield in storing the powder in the shop, without first obtaining the owner's consent, was not within the scope of his employment, and for this reason the defendant would not be responsible for any injury or damage resulting from it. The evidence shows that there was no express authority for doing the act, and no recovery was claimed on this ground. Nor is there any fact tending to show ratification on the part of any superior officer of the company.

The question then resolves itself into the inquiry, whether the act of Bennefield, which produced the injury, incidentally grew out of any authority conferred by the defendant as master, on Bennefield as servant. Can the act be fairly and reasonably implied as one authorized to be done by the servant in the master's absence, and in the given emergency, in furtherance of the master's business? Was it, in other words, impliedly authorized as fairly within the scope of the servant's employment, as the trusted custodian of the property, with the duty imposed on him to use all proper and reasonable means for its safe preservation?

The master may often be held liable for the abuse of the authority conferred on a servant or employee, and this liability sometimes extends to trespasses purposely committed. In such cases, especially where the implication of authority is doubtful, the inquiry may well be, whether the servant was, on the one hand, acting either maliciously or in his own individual interest, or on the other hand, *bona fide*, in preservation or furtherance of the master's interests. This test was adopted in *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361, which involved an injury resulting from a trespass incidentally committed by an agent in the prosecution of the business of the principal,—a subject on which the law has undergone some modification in comparatively recent years. The doctrine of that case, in our judgment, is both just and sound, and is sustained by authority: Wood on Master and Servant, 2d ed., sec. 284, pp. 234–236; sec. 300, p. 567; Cooley on Torts, 535–538.

The charges of the court on this phase of the case fairly stated the law, and were not liable to any criticism.

The court properly submitted the question of the plaintiff's alleged contributory negligence to the jury. The evidence tends to show that Bennefield had promised the plaintiff to remove the explosive combustibles from the shop before the time of needing the premises for work; and we cannot say, in view of this fact, that the conduct of the plaintiff, in failing to ascertain whether the promise had been complied with, before proceeding to use the smith forge on the day of the accident, was *per se* negligence: *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152; *City Council of Montgomery v. Wright*, 72 Ala. 411; 47 Am. Rep. 422; *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494.

There is, in our opinion, no error in the record, and the judgment is affirmed.

WHETHER PARTICULAR ACT OF SERVANT WAS OR WAS NOT DONE IN LINE OF HIS DUTY: See *St. Louis etc. R'y Co. v. Hendricks*, 48 Ark. 177; 3 Am. St. Rep. 220, and note 223; *Fick v. Railroad Co.*, 68 Wis. 459; 60 Am. Rep. 878, and note 880–884.

WHETHER SERVANT DID TORTIOUS ACT WITH VIEW TO HIS MASTER'S SERVICE, or to serve a purpose of his own, is a question of fact for the jury: *Hussey v. Railroad Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; *Redding v. Railroad Co.*, 3 S. C. 1; 16 Am. Rep. 681.

TEST OF MASTER'S RESPONSIBILITY FOR ACT OF HIS SERVANT: *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361; *King v. Railroad Co.*, 66 N. Y. 181; 23 Am. Rep. 37.

CANNON v. LINDSEY.

[85 ALABAMA, 198.]

PARTNERSHIP. — ONE MEMBER OF PARTNERSHIP, WHETHER THEN EXISTING OR DISSOLVED, CANNOT APPROPRIATE the firm assets by transferring them in satisfaction of his individual debt without the authority or consent of his copartners. Such transaction is a fraud on the latter, and does not divest the title of the partnership in favor of the separate creditor, whether he knew it to be partnership property or not.

SET-OFF. — IN ACTION ON PARTNERSHIP DEMAND, WHETHER BROUGHT IN NAME OF PARTNERSHIP or their assignee, the defendant cannot set off against the partnership demand an individual debt due him from one of the partners.

MAKER OF PROMISSORY NOTE WHO SIGNS IT WITHOUT READING, OR HAVING IT READ to him, no fraud, deceit, or misrepresentation being practiced by which he was induced to do so, cannot defeat an action on it by an assignee, under the plea of *non est factum*, because he did not know it was made payable to a partnership and not to an individual partner with whom he was dealing, and against whom he claimed a set-off.

PLEADING AND PRACTICE. — DUPLICITY OR REDUNDANCY is not ground of demurrer, except in the case of dilatory pleas.

EVIDENCE. — GENERAL OBJECTION TO EVIDENCE, some parts of which are competent, may be overruled entirely.

ACTION by Isaac Cannon against Levi Lindsey, founded on the latter's promissory note, payable to the order of Moses Walters & Co., by whom it was assigned to the plaintiff, Cannon. The defendant filed a special plea, verified by affidavit, alleging "that he did not execute the note sued on in this action as a note due to Moses Walters & Co." To this plea the plaintiff demurred, on the grounds: 1. "Said plea is double, since it undertakes to deny the execution of the note sued on, as a plea of *non est factum*, and at the same time admits its execution, and attempts to set up a defense thereto by way of set-off." 2. "Because it shows on its face that said note was executed to Moses Walters & Co., and undertakes to set off a debt due to defendant from Moses Walters individually, a member of said partnership." The court overruled this demurrer, and issue was joined on the pleas of the general issue, set-off, payment, etc. On the trial, the note was introduced in evidence, and the defendant testified in his own behalf, in substance, that at the time he executed the note there were unsettled accounts between him and Moses Walters, and that the note was given on the purchase of a horse from said Walters; that he signed the note without reading it, and gave it to Walters to be held by him until they could have a settle-

ment of their accounts; that no money was to be paid on the note, as Walters was owing him about its amount; that he knew no one but Walters in the transaction, and did not purchase the horse as the property of Moses Walters & Co. The testimony of one Smith, a witness for the defendant, was substantially the same as that of the defendant himself. The plaintiff objected to the entire testimony both of the defendant and the witness Smith, and reserved exceptions to the overruling of his objections. In rebuttal, the plaintiff read in evidence the deposition of Moses Walters, who denied therein all the material matters testified to by the defendant. On request of the defendant, the court charged the jury as follows: "If the jury believe from the evidence that the note sued on was given for a horse sold by Moses Walters to Lindsey, and that it was understood between the parties at the time that the said sale and purchase was made to satisfy an indebtedness from said Walters to Lindsey, and that no money was to be paid, but the note was to await a settlement between them, and should believe that Walters was indebted to Lindsey, at the time the trade was made, to an amount greater than the note, and that the firm of Moses Walters & Co. had then been dissolved, then the jury must find for the defendant." The plaintiff excepted to this charge, and assigned error.

McGuire and Collier, for the appellant.

SOMERVILLE, J. 1. One member of a partnership, whether existing or dissolved, cannot appropriate the assets of the firm by transferring them in satisfaction of his individual debt due to such transferee without the authority or consent of the other members of the firm. Such transaction is considered a fraud on the other partners, and the title to the joint fund or property is not divested in favor of the separate creditor, whether he knew it to be partnership property or not. "In short," as said by Judge Story in a leading case on this subject, "his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not": *Rogers v. Batchelor*, 12 Pet. 221; *Parsons on Partnership*, 2d ed., *113, note, *430; *Halstead v. Shepard*, 23 Ala. 558, 572; *Pierce v. Pass & Co.*, 1 Port. 232; *Burwell v. Springfield*, 15 Ala. 273; *Nall v. McIntyre*, 31 Id. 532; *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293; *Gram v. Cadwell*, 5 Cow. 489; *Evernghim v.*

Ensworth, 7 Wend. 326; *Fancher Brothers v. Bibb Furnace Co.*, 80 Ala. 481.

The case of *White v. Toles*, 7 Ala. 569, which seems opposed to this view, is possibly distinguishable from this case on the ground that the personal services of a partnership, not its assets, were involved in the transaction, the defendant stipulating in advance that certain work was to be done by one of the plaintiffs, and paid for by his boarding with defendant. If not thus distinguishable, the decision is opposed to many other decisions of this court, and is wrong in principle.

2. Closely analogous to the foregoing principle is the rule that where suit is brought on a partnership demand, whether in the name of the partnership or their assignee, the defendant cannot set off against the partnership demand an individual debt due to him from one of the partners. There is not only a want of mutuality between the two demands, but the effect of allowing such a set-off would be an indirect appropriation of partnership assets to the payment of the private debt of one of the individual partners: *Watts v. Sayre*, 76 Ala. 397; *Clark v. Taylor*, 68 Id. 453; *Evans v. Sims*, 37 Id. 710; *Ross v. Pearson*, 21 Id. 473.

If the horse sold by Walters to the defendant was the property of the partnership of Moses Walters & Co., Walters would have no right to make any arrangement with defendant by which the property could be appropriated, either by set-off or payment, in satisfaction of his private debt to the defendant. The charge given by the court at the request of the defendant excluded this phase of the case from the consideration of the jury, and was on this ground erroneous.

3. If the defendant signed the note in question, without any fraud, deceit, or misrepresentation being practiced on him by which he was induced to do so, it would be no defense to this suit that he neglected to read the instrument, or have it read to him: *Burroughs v. Pacific Guano Co.*, 81 Ala. 255; *Goetter v. Pickett*, 61 Id. 387; *Pacific Guano Co. v. Anglin*, 82 Id. 492; *Dawson v. Burrus*, 73 Id. 111. If, therefore, the horse sold to the defendant belonged to the partnership of Moses Walters & Co., and the note given for the horse was made payable to the partnership, and was assigned by the payees to the plaintiff in satisfaction of a claim held by him on said partnership, it would avail the defendant nothing that he neglected to observe the fact that the note was so payable. He could neither defeat the action on the plea of non

est factum, in the form in which it appears in the record, nor prevent a recovery by a set-off of any demand held by him against Moses Walters individually.

4. This plea of *non est factum*, however, not being a dilatory plea, was not demurrable for duplicity; for, under our system of pleading, redundancy, whether of good or bad matter, does not vitiate, except in the case of dilatory pleas: *Lewis v. Lee County*, 66 Ala. 480; *Houston v. Hilton*, 67 Id. 374. The court did not err in overruling this ground of demurrer. And whatever may be the imperfections of the plea, none of the objections urged by the demurrer were well taken.

5. There was much in the testimony of both the defendant, Lindsey, and the witness Smith which could have been excluded, had objection been taken to such illegal parts alone. But some parts of each were competent. The objections being taken to the entire testimony of each, including the legal as well as the illegal parts, without any attempt to separate the one from the other by specification, were properly overruled.

For the error of giving the charge requested by the defendant, the judgment is reversed, and the cause remanded.

ONE PARTNER HAS AUTHORITY to dispose of the partnership property and effects for any and all purposes within the scope and object of the partnership, and in the course of its trade and business: *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319, and note 323. But one partner cannot, without the consent, express or implied, of his copartners, apply a claim of the firm to the payment of his individual debt, even to retain the debtor's custom for the firm: *Cotzhausen v. Judd*, 43 Wis. 213; 28 Am. Rep. 539; and see *Thomas v. Stetson*, 62 Iowa, 537; 49 Am. Rep. 148; *Crosswell v. Lehman*, 54 Ala. 363; 25 Am. Rep. 684; compare *Hapgood v. Cornwell*, 48 Ill. 64; 95 Am. Dec. 516; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530; *Locke v. Lewis*, 124 Mass. 1; 26 Am. Rep. 631. And one partner, dealing in the name of the firm, cannot deprive another member of the firm of his interest in the partnership assets by representations to others with whom he deals that such person is not a member of the firm, where the latter neither authorizes nor knows of such statements: *Rush v. Thompson*, 112 Ind. 158.

WHERE a firm composed of three persons brings action to recover a debt due to the firm as so constituted, the defendant cannot set off a debt due from two of the partners to him against their proportion of the debt sued for: *Rush v. Thompson*, 112 Ind. 158.

GREENE v. LEWIS.

[85 ALABAMA, 221.]

SALES. — TITLE TO PERSONAL PROPERTY MAY PASS TO VENDEE without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties.

SALE. — TITLE AT ONCE PASSES ON SALE AND DELIVERY OF HORSE TO BUYER for a reasonable price to be afterwards agreed on, and the fact that the parties cannot agree afterwards on a reasonable price makes no difference.

JUDGMENT, FORM OF. — IN DETINUE OR CORRESPONDING STATUTORY ACTION for the recovery of personal property *in specie*, the judgment should be “for the property sued for, or its alternate value, with damages for its detention to the time of trial”: Alabama Code of 1886, sec. 2719.

ACTION of detinue by John F. Lewis against A. M. Greene, for the recovery of a horse, with damages for its detention. Issue was joined on the plea of not guilty, and the trial resulted in a verdict for the plaintiff, the jury assessing the value of the horse at seventy-five dollars, and damages for detention at fifty dollars. The judgment set out this verdict, omitting, however, all mention of alternate value. The evidence tended to show that the defendant acquired possession of the pony in the spring of 1882, under a loan from the plaintiff for the rest of the year, and under a contract of purchase, but no price was agreed upon. The defendant's testimony tended to show that in the fall of 1882, while the pony was in his possession, the plaintiff offered to sell her to him at a reasonable price, and allow twenty-five dollars for breaking her, and the defendant agreed to take her on these terms; that the pony was left in his possession until the early part of 1885, when the plaintiff said he was willing to take sixty dollars for her, to which proposal the defendant agreed, but claimed a set-off of a small amount of an account held against the plaintiff's wife; that the plaintiff would not consent to this, but sent word the next day that he would allow the account as a set-off, but would not take less than seventy-five dollars for the pony. The defendant excepted to the refusal of the court to charge as follows: “3. If the jury believe from the evidence that the plaintiff sold the pony to the defendant, and delivered her to him for a reasonable price to be afterwards agreed on, then they must find for the defendant; and the fact that they could not afterwards agree on a reasonable price makes no difference.” The defendant assigned error.

William J. Sanford, for the appellant.

George P. Harrison, contra.

SOMERVILLE, J. The plaintiff's right of recovery in this case depends on the inquiry as to whether he had sold the horse in controversy to the defendant. If he had, he thereby parted with his title to the property, and could not recover in this action; otherwise he could. There is a phase of the evidence which not only tends to prove a sale, but tends also to prove that the price of the horse was left open for future adjustment between the parties. The rule is settled that the title to personal property may pass to a vendee without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties: *Shealy v. Edwards*, 73 Ala. 175; 49 Am. Rep. 43; 75 Ala. 411; *Wilkinson v. Williamson*, 76 Id. 163. It is sufficient for the purposes of this case to decide that the circuit court erred in refusing to give the third charge requested by the defendant.

As the whole case turns mainly on the question whether there was a sale of the horse at a price to be agreed on in the future, or on credit and for a *quantum valebat*, and this is rather a question of fact than of law, under proper instructions from the court, we will not notice the other charges.

The judgment, being in detinue, should have been "for the property sued for, or its alternate value, with damages for its detention to the time of trial": Code 1886, sec. 2719; *Wittick v. Keiffer*, 31 Ala. 199; *Auerbach v. Blackman*, 57 Id. 616; *Robinson v. Richards*, 45 Id. 354; 1 Brickell's Digest, 577, secs. 99, 107, 108; 3 Id. 308, secs. 40 et seq. All mention of alternate value is omitted from the judgment, although specified in the verdict. We call attention to this error that it may not be repeated on another trial.

Reversed and remanded.

SALE OF CHATTEL, WHEN TITLE PASSES: *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Blow v. Spear*, 43 Mo. 496; 97 Am. Dec. 412; *Shealy v. Edwards*, 73 Ala. 175; 49 Am. Rep. 43.

DETINUE, FORM OF JUDGMENT: *Rambo v. Wyatt*, 32 Ala. 363; 70 Am. Dec. 544.

SMITH v. PEARCE.

[85 ALABAMA, 264.]

HOMESTEADS. — DEED BY HUSBAND ALONE TO HOMESTEAD, OR BY HUSBAND AND WIFE JOINTLY, WITHOUT ASSENT and signature of the wife properly acknowledged by her as the statute requires, is a mere nullity; and a subsequent acknowledgment by her, correcting imperfections of the first, cannot operate retrospectively to take away intervening rights which vested before the acknowledgment was perfected.

HOMESTEAD. — VERBAL AGREEMENT BY HUSBAND TO SELL HOMESTEAD, RECEIVING PART OF PURCHASE-MONEY, and allowing the vendee entrance to a part of the dwelling-house, himself and family continuing to occupy some rooms thereof, under an agreement to pay rent for them to the vendee, does not constitute an abandonment by the husband of his right of homestead in the premises, nor enable him to sell and convey without the voluntary assent and signature of the wife.

ACTION of ejectment by John T. Pearce against A. M. Morgan and others, tenants in possession, to recover a certain house and lot. John F. Smith intervened as the landlord of said tenants, and the cause was tried on issue joined on the plea of not guilty. On the trial, the cause was submitted upon an agreed state of facts, in substance as follows: Both parties, plaintiff and defendants, claimed title from a common source,—William M. Taylor. The plaintiff claimed as purchaser at sheriff's sale under execution against said Taylor, issued March 27, 1885, on a judgment recovered against Taylor on February 2, 1882, and the defendants held under a conveyance from one De Arman, who bought from said Taylor. Taylor bought from one Martin in 1878, and continued in possession of the premises thenceforward, occupying them as a residence for himself and family until about Christmas, 1880, when he made a verbal agreement to sell and convey to De Arman. By the terms of this agreement, Taylor was to continue to live on part of the lot, and to occupy the house thereon until Christmas, 1880, when De Arman was to get possession, and be allowed to enter and make repairs. Accordingly, De Arman and his family moved on the lot December 25, 1880, and occupied all of the house, except three rooms, and he took charge of the land; but Taylor and his family continued to occupy said three rooms, and did not move from the lot until about February, 1881, and during that time he paid rent to De Arman, under the verbal agreement made between them. At the time of the said agreement, in October or November, 1880, De Arman paid a part of the purchase-money, and afterwards paid it all. In January,

1881, Taylor and his wife made a deed to De Arman, purporting to convey the land, but the signature of the wife was not acknowledged as the statute requires. In July, 1885, after the commencement of this suit, another certificate of acknowledgment by Mrs. Taylor, pursuing the words of the statute, was added to the deed. In November, 1881, De Arman sold and conveyed the property to said John F. Smith, and Smith was in possession, claiming under this conveyance, at the time of the levy and sale under execution, at which the plaintiff became the purchaser. The jury found for the plaintiff, under the instructions of the court, and the defendants assigned error.

Bishop and Hanna, C. C. Whitson and Brothers, and Willett and Willett, for the appellant.

Kelly and Smith, contra.

SOMERVILLE, J. The present case must turn on one condition: Was the house and lot in controversy the homestead of Taylor, owned and occupied by him as such, at the time of the attempted conveyance of the premises by him to De Arman, on January 5, 1881? If it was his homestead, this deed is admitted to be void, on account of a manifest defect in the certificate of the wife's acknowledgment: *Motes v. Carter*, 73 Ala. 553; Code 1876, sec. 2822. The legal title of the premises, being unaffected by the void conveyance, which is a mere nullity, would remain in the grantor, and be subject to the lien of the plaintiff's execution, issued March 27, 1885, under which the premises were sold and purchased by plaintiff on June 29, 1885, the defendant in execution, Taylor, having then abandoned the premises, and ceased his occupancy: *Striplin v. Cooper*, 80 Ala. 256; *Alford v. Lehman*, 76 Id. 526. If De Arman acquired no title under his deed, the defendant in this action, who claims under him, obviously acquired no better estate or title than his vendor had. The controversy is simply one as to the relative superiority of the title supposed to be acquired by De Arman under his deed, and that acquired by plaintiff under his execution sale.

The record, we may add, shows that the deed from Taylor to De Arman was acknowledged by the wife on July 21, 1885, so as to correct the imperfections of the former certificate. This was nearly a month after the sale of the property under plaintiff's execution. But it is too obvious for argument that this fact can exert no influence on the case, because the new

acknowledgment could not operate retrospectively to take away intervening rights vested before it was perfected.

The contention of appellant, seeking to sustain De Arman's title, is based on the following facts: Taylor, while owning and occupying his homestead with his wife and children, made a verbal contract with De Arman, in October or November of the year 1880, to sell the premises to him, a part of the purchase-money being then paid by the vendee. He then permitted De Arman to move on the premises, and to occupy all the rooms in the dwelling-house except three, which he, Taylor, continued to occupy, for the usual purposes of a homestead, with his family, agreeing to pay rent for them. This was his *status* at the time he executed the deed of January 5, 1881, to De Arman. The inquiry is, Had he then abandoned the premises so as to have ceased his occupancy of them as a homestead? We think not. The verbal agreement to sell was absolutely void,—conferring no rights whatever, notwithstanding the payment of a part or even the whole of the purchase-money. If a deed by the husband alone to the homestead, without the voluntary assent and signature of his wife, or his written agreement, is a nullity, as often decided, *a fortiori* a verbal agreement to sell must likewise be void,—as if it had never been. We may therefore discard this incident from the case as entirely immaterial.

It is plain that Taylor had never left or quit the premises. He was still in the actual use and occupancy of the three rooms as a home, residence, or dwelling-place of himself and family, and had no other. He certainly owned the place, because he had never parted with the title. He also occupied it as fully as if he had let to De Arman, or any other lodger, all of the premises except the three rooms retained. In the latter event, it could scarcely be maintained that such letting of a part would be an abandonment of the whole. The contrary has often been held: *Pryor v. Stone*, 70 Am. Dec. 350, note; *Phelps v. Rooney*, 76 Id. 244. The renting of the premises by Taylor from De Arman did not operate either to create an abandonment or to estop him from showing that in reality the relation of landlord and tenant did not exist between them. We have held that a verbal promise of the owner of a homestead to pay rent to the grantee, under a deed void for the want of the voluntary assent and signature of his wife, no actual change of possession being shown, was without consideration, and did not create the relation of landlord and

tenant, so as to estop the real owner of the premises from denying the title of his alleged landlord. Such an arrangement, it was suggested, could not be allowed to defeat the purpose and policy of the homestead law as expressed in our statutes and constitution: *Crim v. Nelms*, 78 Ala. 604. In principle, the present case is scarcely distinguishable from that deliverance. If a homestead can be verbally rented to a lessee, and he be allowed entrance, it may be to a single room of the dwelling, and a deed, afterwards made by the husband alone, against the protest of the wife, can operate to convey a good title to the grantee, a wide door would be open for the nullification of the salutary restrictions thrown around the alienation of homesteads by the law. It would enable husbands easily to do by indirection, without the knowledge or even suspicion of the wife, what they are prohibited positively by law from doing directly: *Alford v. Lehman*, 76 Ala. 529; *Taylor v. Hargous*, 4 Cal. 268; 60 Am. Dec. 606, and note.

In arriving at the conclusion that there had been no abandonment or forfeiture by Taylor of his right of homestead at the time of the attempted sale of the premises, we but adopt that construction of our laws on this subject which, in our opinion, will best promote the wise and liberal policy in which they had their origin.

The circuit court did not err in giving the general affirmative charge in favor of the plaintiff upon the agreed statement of facts contained in the bill of exceptions, and the judgment must be affirmed.

NECESSITY OF JOINDER OF HUSBAND AND WIFE IN CONVEYANCE OR RELEASE OF HOMESTEAD: *Poole v. Gerrard*, 6 Cal. 71; 65 Am. Dec. 481, and note 484.

NO INTEREST, ENCUMBRANCE, OR LIEN, except those specifically mentioned in the organic law, can attach to or affect the homestead, unless given by the joint consent of husband and wife: *Pilcher v. Atchison etc. R. R. Co.*, 38 Kan. 516; 5 Am. St. Rep. 770. And a wife may not subsequently ratify a mortgage of the homestead not properly acknowledged by her: *Howell v. McCrie*, 36 Kan. 636; 59 Am. Rep. 584.

ABANDONMENT OF HOMESTEAD, WHAT CONSTITUTES: *Taylor v. Hargous*, 4 Cal. 268; 60 Am. Dec. 606, and note 607-615. Ordinarily, a lease of a homestead for life is conclusive evidence of an abandonment of it; but if the lease reserves to the lessor the right to return to the homestead, and it is his intention to return, there is no abandonment: *Gates v. Steele*, 48 Ark. 539.

A wife cannot defeat a conveyance of the homestead by showing that when she acknowledged the deed she did not understand its import, or that the officer did not explain it to her, unless she also shows that these facts were brought to the knowledge of the purchaser: *Miller v. Yturria*, 69 Tex. 549.

CENTRAL RAILROAD AND BANKING COMPANY v. CHEATHAM.

[85 ALABAMA, 292.]

REWARD. — **GENERAL OFFER OF REWARD FOR ARREST OF, WITH PROOF TO CONVICT, ANY PERSON** committing a specified offense is a promise conditional on doing the proposed acts, which, by performance, becomes a binding contract, the offer not being previously revoked.

REWARD. — **RAILROAD COMPANY HAS IMPLIED POWER TO OFFER** a general standing reward for the detection, apprehension, and bringing to justice of persons who may obstruct its road, or otherwise offend against its property rights, and such authority is incident to the business and duties of the superintendent, and to the purposes of his department, and consequently is within the scope of his agency.

REWARD. — **PRINTED CIRCULAR WHICH PURPORTS BY ITS HEADING TO BE ISSUED IN NAME OF RAILROAD COMPANY,** offering a reward for the arrest of any person, with proof to convict, of maliciously obstructing the tracks of the company, and signed by its superintendent with the affix of the abbreviation of "superintendent" to his signature, is, on its face, the act or offer of the company, which is bound thereby.

REWARD. — **A CIRCULAR HAVING BEEN SENT BY MAIL TO PLAINTIFF SUING TO RECOVER** the reward in response to a letter directed to the superintendent, and in an official envelope addressed in the handwriting of his secretary, the presumption is, in the absence of rebutting evidence, that it was an official transaction.

REWARD. — **ON QUESTION OF RATIFICATION, FACTS THAT CIRCULARS WERE POSTED** at various public places on the line of the railroad, by direction of an employee, who was under the control of the superintendent, and remained posted for several months, and until after the rendition of the service, were proper to go to the jury, as tending to show that the officers of the company were cognizant of the superintendent's act in offering the reward.

REWARD. — **TERMS OF OFFER CONTAINED IN A CIRCULAR BEING GENERAL,** the offer applied equally to offenses either before or after the date of the circular.

AGENCY. — **WHEN ACT IS DONE WITHOUT AUTHORITY, under an assumed agency,** it is the duty of the principal, if he would avoid responsibility therefor, to disavow and repudiate it in a reasonable time after information of the transaction.

ACTION by W. D. Cheatham against the Central Railroad and Banking Company of Georgia, and the Montgomery and Eufaula Railway Company of Alabama, to recover the amount of a reward which, as alleged, the defendants had offered for the arrest and conviction of any person or persons having maliciously obstructed the defendants' tracks. Other facts appear in the opinion.

Arrington and Graham, for the appellant.

Rice and Wiley, contra.

CLOPTON, J. In June, 1886, the appellee arrested three individuals for the offense of having maliciously obstructed the railroad of the Montgomery and Eufaula Railway Company. One of them was discharged by the magistrate on the preliminary investigation; the other two were committed, subsequently indicted, and convicted. Thereupon appellee brought the suit to recover a reward claimed to have been offered by the appellants. The offer was by means of a printed circular, of which the following is a substantial copy:—

“Central Railroad and Banking Company of Georgia, Southwestern Railroad Division; Montgomery and Eufaula Railway Company of Alabama.

“\$300 Reward. For the arrest, with proof to convict, any person or persons for the malicious obstructing of the tracks of these companies.

THEO. D. KLINE, Sup't.”

The offer, though general, being for the arrest of any persons committing the specified offense, may be regarded a promise conditional on doing the proposed acts, and by performance becomes a binding contract, not having been previously revoked. To entitle the plaintiff to recover, it was incumbent on him to prove, not merely the arrest, but also that he furnished proof to convict. The nature and sufficiency of the proof so furnished need not be circumstantially shown; it is sufficient, if shown that he furnished the proof on which the conviction was had.

The material and important questions on which the liability of the defendants depends are raised by the objections to the admission in evidence of the circular. The objection involves the power of railroad corporations, and the authority of the superintendent, in the absence of express authority by the managing body, to offer such general rewards, the nature and extent of the offer, and the collateral rulings of the court on the admissibility of the evidence to show that the offer was made by the superintendent, and that it was adopted and ratified by the corporations. Without controverting the power of such corporations to offer rewards in special cases, it is contended that they have no implied power to offer a general standing reward. The argument is, that the state having enacted laws to protect their property, and being presumed capable of enforcing them, such implied power is unnecessary. The general principle will be conceded that a corporation can do no acts, and make no contracts, except such as are authorized by its charter or by the general law. All the powers,

however, need not be conferred in express terms. There are implied powers incident to every private corporation, — power to do such acts as are necessary or proper, directly or indirectly, to carry the express powers into effect, and to enable it to answer the purposes of its creation.

Among the powers incidental to all private corporations is the authority to institute the established and appropriate legal proceedings for the enforcement of their rights and the protection of their property. It is of the highest importance and necessity that the tracks of railroad companies, employing the powerful agency of steam in the transportation of freight and passengers by day and by night, shall be kept free from obstructions, and that every reasonable precaution to secure safety should be used by the officers or agents to whom this duty is intrusted. For the purpose of affording protection, the statute declares that any person who wantonly or maliciously places any obstruction or impediment on a railroad shall be guilty of a felony. The enforcement of the criminal law is essential to the peace, good order, and security of the community. The institution of prosecutions against those who commit the offense of obstructing the railroad is a legitimate and proper means of protecting the property of such corporations. The power to institute such prosecutions is a necessary implication from the nature of their business and the necessities of their condition. The prosecution of persons accused of crime by citizens whose rights have been specially offended is encouraged in aid of the state authorities to bring them to justice; and the offer of rewards for the apprehension of perpetrators of felonies when unknown, and of fugitives from justice when known, is the policy of the state: Code 1886, sec. 4746. There can be no question of the authority of the corporations to offer rewards and employ agents to detect and arrest violators of the criminal law enacted for their protection. On the ground of such authority is founded their responsibility for the willful and malicious acts of such agents, when done in executing the agency. Railroad companies ordinarily operate long lines, which render it impracticable to guard every section. Usually obstructions are placed on the road-beds under cover of secrecy, and the perpetrators are unknown. Prompt action is necessary to their detection. Delay after the commission of the offense renders the detection more difficult, and frequently defeats it altogether. A general reward tends to promote immediate and prompt vigilance and effort, is more efficient to

prevent the commission of such offenses, and is not inconsistent with any law or public policy, nor foreign to the objects of the corporation. A general standing reward may be offered by natural persons, and equally by corporations: *Ricord v. Central Pacific R. R. Co.*, 15 Nev. 167; *American Express Co. v. Patterson*, 73 Ind. 430.

But though the corporation may have such implied power, it is insisted that the superintendent has no authority to offer a general reward, unless expressly granted by the board of directors. A corporation necessarily acts by representation, and the appointment of an agent includes power to do anything necessary and usual to execute the authority with effect. The scope and character of the business which he is empowered to transact is the measure of the authority of a general agent. The real authority of a superintendent is not restricted to such powers as may be conferred in terms by the board of directors, or by the by-laws, or by the usages of the corporation, but also includes such powers as are incident to his general duties and express authority. To him is intrusted, as the representative of the corporation, the general management and supervision of the running and operation of the road, and it is his general duty to take care that it is kept in safe condition. In the discharge of this duty, he may adopt any legitimate mode, and employ any means which are usually deemed effectual and proper, to protect the road against obstructions. As we have shown that railroad corporations have the implied power to offer a general reward for the detection, apprehension, and bringing to justice of persons obstructing the road, such authority is incident to the business and duties of the superintendent, and to the purposes of his department; consequently within the scope of his agency: *Toledo etc. R'y Co. v. Rodrigues*, 47 Ill. 188; 95 Am. Dec. 484.

The objection to the introduction in evidence of the circular is founded on the further ground that the offer of the reward is, on its face, the personal obligation of the superintendent, and on the absence of evidence showing that it was intended to bind the defendants. The general rule undoubtedly is, that when a contract is made by an agent, in order to bind the principal, it should be made in his name, and purport to be his contract. An exception to the general rule is, that when an agent has incidental authority to make contracts in relation to his usual and general employment, both he and the principal may be personally responsible, though the con-

tract may be made in the name of the agent, and that the true character of the transaction may be shown by parol evidence: *McTyer v. Steele*, 26 Ala. 487. It is true, no attempt was made to show, by extrinsic evidence, that the offer was intended to be the personal engagement of the defendants, and the mere affix of the abbreviation of superintendent to his signature does not, *prima facie*, impose a personal liability on them. But the form and manner of the signature are not conclusive. The offer itself furnishes its own interpretation. It purports by the heading to be made in the names of both defendants, and is in relation to and connected with their property and business. In such case, the signature of Kline as superintendent must be regarded as the signatures of the corporations by him. In form and terms, the offer is the joint and several contract of the defendants: *Collins v. Hammock*, 59 Ala. 448.

For the purpose of showing that the offer was made by Kline as superintendent, the plaintiff was allowed to prove, against the objection of the defendants, that he wrote a letter to Kline, without stating its contents, which was sent by mail, addressed to him at Macon, Georgia, his place of residence and business. A few days thereafter, he received by mail the printed circular, inclosed in an envelope, postmarked Macon, Georgia, on which were printed the words, "Official business; Office of Superintendent," and the names and description of defendants as they appear in the circular; and also that, after the arrests, in an interview with Kline, the plaintiff stated that he wished one Malloy, who was in the employ of one of the defendants, as a witness at the trial of the accused persons, who Kline promised should be present, and that he was present at two terms of the court. That Kline was superintendent of the southwestern division of the Central Railroad and Banking Company, and of the Montgomery and Eufaula Railway Company, which was part and parcel of the former, were admitted facts. His name as affixed to the circular was printed, which rendered the positive proof of his signature impracticable, and resort to circumstantial evidence compulsory. The printed circular having been sent by mail in response to a letter directed to the superintendent, and in an official envelope addressed in the handwriting of his secretary, the presumption is, in the absence of rebutting evidence, that it was an official transaction. The facts and circumstances above stated were relevant and proper to be consid-

ered by the jury in determining the question whether the offer was made by the defendants, through Kline as their superintendent.

When an act is done without authority, under an assumed agency, it is the duty of the principal, if he would avoid personal responsibility therefor, to disavow and repudiate it in a reasonable time after information of the transaction: *Mobile etc. R'y Co. v. Jay*, 65 Ala. 113. It would be unjust to permit plaintiff to expend his time, labor, and skill, in detecting, arresting, and procuring proof to convict, on the faith of the offer of reward, and then allow defendants, if cognizant of the offer, to disavow the obligation, after receiving the benefits, under the pretense of want of authority. On the question of ratification, the facts that the circulars were posted at various public places on the line of the railroad, by direction of an employee of the defendants, who was under the control of the superintendent, and remained posted for about three months, and until after the rendition of the service, were proper to go to the jury, as tending to show that the officers or agents of defendants were cognizant of the offer: *Kelsey v. National Bank*, 69 Pa. St. 426.

It is further insisted that the offer of the reward was prospective, and did not apply to the arrest, with proof to convict, persons who had committed the offense previously to its date. While the offer may be largely preventive in its nature and purpose, prevention may be rendered as effectual by industrious efforts to bring to justice those who have already committed as by causing the arrest and punishment of those who may thereafter commit the offense. The words, "for the malicious obstructing of the tracks of these companies," were used to designate the special offense, and were not intended to confine the reward to the commission of future to the exclusion of past offenses. Its terms are broad enough to embrace both; but if it should be limited to either, the reasonable construction would be in favor of its application to offenses committed, and not solely anticipative of future commissions. We discover nothing in the terms of the offer which authorizes the construction contended for by appellants.

The rulings and charges of the court are in accord with the foregoing principles.

Affirmed.

54 HOME PROTECTION OF N. ALABAMA v. AVERY. [Alabama,

Fitch v. Snedaker, 38 N. Y. 248; 97 Am. Dec. 791; *Besse v. Dyer*, 9 Allen, 151; 85 Am. Dec. 747, and note 749; *Hayden v. Souger*, 56 Ind. 42; 26 Am. Rep. 1, and note 5-10.

WHO MAY CLAIM REWARD: *Matter of Russell*, 51 Conn. 577; 50 Am. Rep. 55; *Hayden v. Souger*, 56 Ind. 42; 26 Am. Rep. 1; *Auditor v. Ballard*, 9 Bush, 572; 15 Am. Rep. 728.

RATIFICATION BY PRINCIPAL OF AGENT'S UNAUTHORIZED ACTS: See *Meyer v. Morgan*, 15 Miss. 21; 24 Am. Rep. 617; *Cairo etc. R. R. Co. Mahoney*, 82 Ill. 73; 25 Am. Rep. 299; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611; *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728.

HOME PROTECTION OF NORTH ALABAMA v. AVERY.

[85 ALABAMA, 348.]

INSURANCE. — IF INSURANCE COMPANY, BY ITS HABITS AND COURSE OF BUSINESS, CREATES in the mind of the policy holder a belief that payment of premiums may be delayed until demanded, or otherwise waives the right to demand a forfeiture, this is binding on the company, notwithstanding the policy expressly stipulates that it shall be void on non-payment of premiums when due.

ACTION on policy of insurance against fire. The opinion states the case.

H. A. Garrett and James E. Cobb, for the appellant.

John M. Chilton, contra.

STONE, C. J. It is shown in the record before us that the appellee, a married woman, took out three policies in the appellant corporation, a fire insurance company. Two of them were against losses by fire or lightning, and the third one against losses by storms. Only one of the policies is before us, and it is the foundation of the present action. It bears date November 27, 1883, was to run five years from date, and was based on a gross premium of \$44, one fifth of which — \$8.80 — was paid in advance, and the remaining four fifths were to be paid in installments of the same amount, on the fifteenth day of March, severally, in the years 1885, 1886, 1887, and 1888. This policy insures two separate barns, with their contents of hay and grain, each separately valued. The number of this policy is 50,835. The barns and the contents were destroyed by fire December 4, 1885. The defense was rested alone on the fact, not disputed, that the assured had failed to pay the installment of premium — \$8.80 — due March 15, 1885.

One clause of the policy of insurance is in this language:

"This company shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any installment of premium due by the terms of the installment note. On payment by the assured of all installments of premiums due under this policy, and the installment note given thereon, the liability of this company on this policy shall again attach, provided written consent of the secretary of this company be first obtained; and the policy [shall] be in force from and after such payment, unless this policy shall be void and inoperative from some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment. . . . It is further provided that no attempt, by law or otherwise, to collect any note given for the cash premium, or any installment of premium due upon any installment note, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive the policy; but upon payment by the assured or his assignee of the full amount due upon such note, and costs, if any there be, this policy shall thereupon be in full force, unless the same be inoperative or void from some other cause than the non-payment of note."

The application for the policy, and which is made a part of the contract of insurance, contains a stipulation similar to that above.

It is contended for appellee that the insurance company waived all ground of forfeiture in this case, and several grounds are urged in support of this contention: 1. It is claimed that it was the custom of the insurance company to notify its customers when their premium notes fell due, and that it failed to do so in this case; 2. That the company never gave notice of any claim that the policy was forfeited until after the destruction of the property by fire; 3. That after the company had notice of the loss, it informed the assured, by letter from its secretary, that its adjuster would be around soon and adjust the amount of the damage.

Testimony was offered tending to show it was the custom of the appellant insurance company to give notice to its customers when their installments of premium would mature. There was testimony that such had been the practice of this company in prior dealings with the appellee, and with other persons who held its policies. And there was testimony, not denied, that the Home Protection Company had given notice of the time when premiums would mature on the other two policies held

by the appellee, and that such maturing premiums had been promptly paid. It was testified that no such notice had been given as to this policy; and if notified, the assured was able and would have paid it. This testimony was not controverted, and no explanation was offered why notice was given in the one case and not in the other. Almost the only questions presented for revision in this case grow out of the admission of the foregoing testimony against appellant's objection, and charges of the court based upon it, to which exceptions were also reserved. There were many charges. The substance of them was, that "if, by the statements of its authorized agent after the making of the policy, and by its course of business with plaintiff and others, her neighbors, she was induced to believe that defendant would notify her of the time of payment, and would not insist on a forfeiture in case of an unintentional failure to pay the premium note, and she did unintentionally fail to pay the note, then the defendant cannot in good conscience be allowed to set up the non-payment as a defense."

The rule and its exception are correctly stated in May on Insurance, section 356, as follows: "No notice is required from the insurer to the insured, that the premium, or note given for premium, is about to become due, unless the custom and course of dealing between them has been such as to justify the insured in the belief that such notice would be given, and induce him to rely upon it to his prejudice": *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621; *Union Cen. Life Ins. Co. v. Bernard*, 33 Ohio St. 459; 31 Am. Rep. 555. See also, as to waiver of forfeiture, *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542; *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558; 3 Am. Rep. 404; *Buckbee v. United States Ins. etc. Co.*, 18 Barb. 541; *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240; 27 Am. Rep. 443; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Piedmont & A. Life Ins. Co. v. Young*, 58 Id. 476; 59 Am. Rep. 770.

It is not our intention to deny that if a policy stipulate that it shall be void on non-payment of premium, and there is nothing else in the transaction, such forfeiture will be enforced. What we do decide is, that if an insurance company, by its habits of business, create in the mind of a policy holder the belief that payment may be delayed until demanded, or otherwise waive the right to demand a forfeiture, this is binding on the company, notwithstanding the express letter of the

policy may not have been conformed to: *Mutual Ben. Life Ins. Co. v. Jarvis*, 22 Conn. 133; *American Ins. Co. v. Henley*, 60 Ind. 515; *Williams v. Albany Ins. Co.*, 19 Mich. 451; 2 Am. Rep. 95; *American Ins. Co. v. Stoy*, 41 Mich. 385; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; 4 Am. Rep. 675; *Schmidt v. Peoria Mar. & Fire Ins. Co.*, 41 Ill. 295; *Garlick v. Mississippi Valley Ins. Co.*, 44 Iowa, 553; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390. See also, as to waiver of written terms of contract, *Liddell v. Chidester*, 84 Ala. 508.

The rulings in this case are in substantial conformity with the principles declared above, and we find no error of which appellant can complain.

Affirmed.

INSURANCE COMPANY. — WAIVER OF FORFEITURE arising from breach of condition in policy: See *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Oshkosh G. L. Co. v. Germania F. I. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233; *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329; 59 Am. Rep. 799; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 304.

WOODALL v. KELLY.

[85 ALABAMA, 368.]

VENDOR'S LIEN. — WHEN PURCHASER OF LAND ASSUMES AS PART OR WHOLE OF AGREED PURCHASE-MONEY DEBT which his vendor owes to a third person, and gives his note, payable to such third person, by mutual agreement among the three, the note continues to be a charge on the land as a vendor's lien, and, unless waived, may be enforced by the payee by bill in equity in his own name.

QUESTION OF WAIVER OF VENDOR'S LIEN IS ONE OF FACT, OR INTENTION manifested by acts or declarations of the contracting parties. And the taking of collateral security, or of a note for the purchase-money with the names of strangers, or other persons than the purchasers of the land, as personal securities, or co-makers, or indorsers, will *prima facie* be construed as a waiver of the lien; but this presumption is open to rebuttal by evidence that such was not the intention of the contracting parties.

VENDOR'S LIEN. — IF PURCHASER IN POSSESSION OF LAND CAN CLAIM ABATEMENT of purchase-money, in a suit to enforce the vendor's lien, on the ground that the conveyance was void as to part of the land, the defense must be interposed by cross-bill or answer, alleging the insolvency of the vendor, and electing to recoup damages for the defect of title; and the defense must fail if it appears that the vendor is able and willing to perfect the conveyance, and relief is granted him on the express condition that he does so.

USURY. — PAYMENT OF USURIOUS INTEREST ON ONE OF TWO NOTES given for the purchase-money of land, in consideration of indulgence or for-

bearance, does not render the other note usurious, which remains in force without renewal, discharge, or cancellation, and the plea of usury is unavailing in defense of a suit to enforce the notes as a lien on the land.

QUESTION OF USURY IS NOT RAISED BY PLEA OR ANSWER WHICH FAILS to state distinctly the terms and nature of the alleged usurious agreement, and the specific amounts for which credits are claimed.

FRAUDULENT CONVEYANCES. — CONVEYANCE OF LAND BY INSOLVENT FATHER TO HIS SON, IN CONSIDERATION of the latter's promise to support and maintain the former and his wife during their natural lives, is fraudulent *per se*, and void as to existing creditors of the grantor, and the grantee cannot be regarded as a *bona fide* purchaser.

VENDOR'S LIEN — NOTICE. — PURCHASER OF LAND IS CHARGEABLE WITH NOTICE OF VENDOR'S LIEN existing on the land at the time of his purchase, if he then knew that a part of the purchase-money was unpaid. He is put on inquiry by such knowledge as to the existence of the lien.

BILL filed in March, 1877, by the partners composing the late firm of G. W. Kelly & Co. against W. W. Woodall, J. S. Woodall, F. B. Woodall, L. T. Woodall, C. V. Atkinson, and J. E. Windham, seeking to enforce a vendor's lien on land for part of the purchase-money alleged to be unpaid. The complainants' debt was evidenced by a note dated October 16, 1882, for \$525, payable on November 1, 1884, to G. W. Kelly & Co., or bearer, signed by all of the defendants except L. T. Woodall, and contained a waiver of exemptions. The land on which it was sought to enforce the lien had belonged to said Atkinson, and by him sold and conveyed to said Windham in 1880, at the price of two thousand dollars; and in October, 1882, some of Windham's notes for the purchase-money being due and unpaid, and he desiring to sell the land to the Woodalls, an agreement was made between the several parties, in terms thus set out in the bill: "Thereupon said Windham effected an agreement with said G. W. Kelly & Co. to pay said Atkinson said Windham's notes for said land, the balance due being \$1,050, and that said Windham would make a deed of conveyance for said land to said W. W., F. B., and J. S. Woodall; and with the further understanding with complainants and all of said respondents that when said Windham executed said deed to said Woodalls, then they were to execute their promissory notes for \$1,050 to complainants in place of said Windham, the same being for said lands, and in consideration that complainants paid said Atkinson for the same." The complainants accordingly paid said Atkinson \$1,050, the balance of the purchase-money due by Windham, and Windham executed a conveyance of the land

to said W. W., J. S., and F. B. Woodall, in which his wife joined, but which was not properly acknowledged to pass title to part of the land, which was his homestead; and the Woodalls, with Atkinson and Windham, executed their two notes to complainants for \$525 each, the last of which is the foundation of this suit. This note, a copy of which was made an exhibit, showed credits indorsed as follows: \$21 paid February 7, 1885, and \$88.38 paid April 17, 1886. L. T. Woodall, who did not sign the notes, was the son of W. W. Woodall, and the bill alleged that he was in possession of part of the land, claiming as his own, and exercising acts of ownership over it. Decrees *pro confesso* were taken against Atkinson and Windham, and they made no defense. A joint and several answer was filed by W. W., J. S., and F. B. Woodall, in which they demurred to the bill for want of equity, "because its averments show that complainants do not sustain the relation of vendors, assignees, or transferees of said debt or purchase-money note, and have no vendor's lien"; alleged that they contracted for an indefeasible and unencumbered title, and refused to give a mortgage on the land, and that a vendor's lien was waived; and claimed an abatement of the purchase-money on account of a defect in the title, because 160 acres of the land was the homestead of said Windham, and the conveyance was not properly acknowledged by his wife; and pleaded usury and a failure of consideration to the extent of eight hundred dollars, the value of the homestead tract. The plea of usury was as follows: "Respondents aver that the said note upon which this suit is founded is usurious and void for the interest thereon." And the answer as to the defense of usury was as follows: "Respondents aver and charge that they paid said first note of \$525 in good faith, but not when the same fell due; that they paid complainants \$305.73 on said note when due, and that complainants then refused to indulge them on the balance (\$219.37) at eight per cent, as they had agreed, but demanded twelve and a half per cent, and the respondents agreed to pay that per cent on said balance for one year; but when the year's time was extended [expired] complainants demanded, took, and retained fifteen per cent usurious interest on said balance, said usurious interest amounting to about thirty-three dollars. Respondents aver that they have paid complainants the sum of \$667.73 in all on said notes; that they are entitled to a credit of \$142 and some cents on the note sued on, whereas it will be seen by reference

to exhibit B that the complainants have only given them credit for about \$109, retaining \$33 and a few cents usurious interest, as aforesaid, which was demanded by complainants, and paid by respondents on said notes." L. T. Woodall filed a separate answer, claiming to be a purchaser of a third interest in the land from W. W. Woodall for valuable consideration, and without notice of any lien on the land. The chancellor overruled the demurrer to the bill, and on final hearing rendered a decree for the complainants, holding that they had a vendor's lien on the land, which had never been waived or relinquished, and overruling all the defenses set up by the respondents; but he required that Windham and wife should execute and deliver to them or to the register a conveyance of the homestead, properly executed and acknowledged, before the land was sold in enforcement of the balance due the complainants. The Woodalls appealed.

H. H. Blackman, for the appellants.

A. L. Milligan, *contra*.

SOMERVILLE, J. 1. When the purchaser of land assumes as part or whole of the purchase-money a debt which his vendor owes to a third person, and gives his promissory note, payable to such third person, by mutual agreement of all parties concerned, the note continues to be a charge on the land as a vendor's lien for unpaid purchase-money, and unless waived, such lien may be enforced by the promisee by bill in equity for his own benefit: *Carver v. Eads*, 65 Ala. 190; *Buford v. McCormick*, 57 Id. 428; *Terry v. Keaton*, 58 Id. 667; *Latham v. Staples*, 46 Id. 462. The consideration which supports the promise to pay the note in suit was unquestionably the purchase by the Woodalls of the land described in the bill, upon which a vendor's lien is sought to be enforced. The lien was not the creature of specific contract, but the incident of the debt due for purchase-money. The Woodalls owed their immediate vendor, Windham, for the land; Windham owed Atkinson; and Atkinson owed the appellees, Kelly & Co., who are complainants in the present bill. By mutual agreement of all parties in interest, the note for the purchase-money was made payable to Kelly & Co. in payment of their claim against Atkinson, and of Atkinson's against Windham, to the extent of the face of the debt. These facts bring the case fully within the rule announced in *Carver v. Eads*, *supra*, and other cases cited above.

2. The next inquiry is, Has this vendor's lien, which presumptively passed to complainants with the transfer of the debt, and as an incident of it, been lost by waiver or abandonment? The authorities are uniform in holding that the lien may be waived by express or implied consent, the whole question being one of fact, or intention manifested by acts or declarations of the contracting parties, and the burden of proof being always cast on the purchaser to affirmatively establish such waiver. And the taking of collateral security, or of a note for the purchase-money with the names of strangers, or other persons than the purchasers of the land, as personal securities, or co-makers, or indorsers, will *prima facie* be construed as a waiver or abandonment of the lien: *Tedder v. Steele*, 70 Ala. 347; *Chapman v. Peebles*, 84 Id. 283; *Marshall v. Christmas*, 39 Am. Dec. 199, note 202; *Conover v. Warren*, 41 Id. 196. It is insisted by appellants that taking the names of Atkinson and Windham as personal sureties on the note in suit in addition to the names of the three Woodalls, who purchased the land, operated as a waiver of the vendor's lien, as evincing an intention to rely exclusively upon the personal security thus taken. The presumption of a waiver, as we have said, is undoubtedly raised by this fact; but it is open to rebuttal by evidence that such was not the intention of the contracting parties.

3. We concur in the conclusion reached by the chancellor, that the weight of the evidence supports the view that at the time of the execution and delivery of the purchase-money notes they were received by the complainants with the understanding, orally expressed, that the vendor's lien was not to be relinquished. This, according to all the authorities, was sufficient to overcome the implication of the contrary intention raised by the mere act of taking personal security, with a waiver of exemptions on the notes of the Woodalls: *Cordova v. Hood*, 17 Wall. 1; *Napier v. Jones*, 47 Ala. 90; 1 Jones on Mortgages, sec. 196; *Fonda v. Jones*, 42 Miss. 792; 2 Am. Rep. 669; *Daughaday v. Paine*, 6 Minn. 443; *Moshier v. Meek*, 80 Ill. 79; *Walker v. Struve*, 70 Ala. 167.

4. One of the defenses set up in the answer, for which an abatement of the purchase-money is asked, is a defect of title to a part of the land, occasioned by the failure of the vendor Windham's wife, by proper acknowledgment and separate examination, to give her voluntary assent and signature to the conveyance of the homestead which was embraced in the

premises described in the bill. This conveyance, which is a warranty deed, although void as to that part of the premises which embraces the homestead, is valid as to that part of the land in excess of the homestead: *McGuire v. Van Pelt*, 55 Ala. 344. Whether the defendants, under this state of facts, can remain in possession of the premises, and set up this defense so as to abate the purchase-money, we do not decide. If they can, the defense should be interposed by cross-bill or answer, alleging the insolvency of the vendor, and electing to recoup damages for the defect of title: *Tedder v. Steele*, 70 Ala. 347; *Pitts v. Powledge*, 56 Id. 147; *Hughes v. Hatchett*, 55 Id. 539. There is no allegation in the answer of the vendor Windham's insolvency, nor any proof of this fact, which proves fatal to the defense.

5. There is another reason, also, why this defense must fall to the ground. The relief granted by the chancellor is on the express condition that Windham and wife shall perfect their deed by proper acknowledgment and Mrs. Windham's separate examination, which the testimony shows they have always been willing to do upon the payment by the Woodalls of their notes for the purchase-money. This leaves no vestige of equity in the effort to recoup based on this ground.

6, 7. The plea of usury is equally unavailing, for two reasons: 1. It is not pretended that there was any usury in the original contract, which was one of mere purchase and sale. It is only urged that there was a subsequent payment of usurious interest on one of the notes, in consideration of indulgence or forbearance. This does not render the other note usurious, which remains in force without renewal, discharge, or cancellation: *Allen v. Turnham*, 83 Ala. 323; *Van Beil v. Fordney*, 79 Id. 76. 2. The answer fails to state with sufficient distinctness the terms and nature of the alleged usurious agreement, and the specific amounts for which credit is claimed. The question of usury is not, therefore, raised by the answer: *Munter v. Linn*, 61 Id. 492; *Sec. L. Ass'n v. Lake*, 69 Id. 456.

8. The defendant L. T. Woodall cannot, under the admitted facts of the case, be regarded as a *bona fide* purchaser of the one-third interest of W. W. Woodall in the land. He bore the relation of son to his immediate vendor, the father, who was, at the time of making the deed, insolvent, owing the debt in suit, and one other of about two hundred dollars. The consideration of the deed on the son's part was his promise to sup-

port and maintain the grantor and his wife during their natural lives. This is, in legal effect, a conveyance of property to the son by the grantor in trust for himself, and is fraudulent and void as to existing creditors of the grantor. No debtor, especially if insolvent, is permitted to tie up his property by a conveyance of this kind, in trust for the enjoyment of himself and family, so as to place it beyond the reach of his creditors. In *Sandlin v. Robbins*, 62 Ala. 477, a father conveyed certain land to his daughter and her husband, a part of the recited consideration being that the grantees were to suffer the grantor and his wife (the father and mother) to reside on the premises during their natural lives, and were to contribute from the proceeds of the land whatever their necessities, comforts, and conveniences might reasonably require. The conveyance was held to be *per se* void, as one made in trust for the use of the grantor, without regard to any question of fraudulent intent or the grantor's solvency. This case is in full accord with the rule settled in other analogous cases: *Benedict v. Renfro*, 75 Id. 121; 51 Am. Rep. 429; *Reynolds v. Crook*, 31 Id. 634; *Miller v. Stetson*, 32 Id. 161.

9. The testimony, furthermore, authorizes the conclusion attained by the chancellor, that L. T. Woodall is chargeable with notice of the vendor's lien existing on the land at the time of his purchase. He knew of the existence of the debt for the unpaid purchase-money, according to the preponderance of the evidence. This should have put him on inquiry as to the existence of the lien, which was an incident of the debt; and such inquiry, properly prosecuted, would have disclosed the fact that it was not waived by the taking of personal security: *Foster v. Stallworth*, 62 Ala. 547; *Lomax v. Le Grand*, 60 Id. 537.

We discover no error in the record, and the judgment is affirmed.

VENDOR'S LIEN, existence, waiver, and assignability of: *Schnebly v. Ragan*, 7 Gill & J. 120; 28 Am. Dec. 195, and note 199; *Hays v. Hovine*, 12 Iowa, 61; 79 Am. Dec. 518; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153, and note 156; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Stevens v. Chadwick*, 10 Kan. 406; 15 Am. Rep. 348.

VENDOR'S LIEN—EFFECT OF TAKING VENDEE'S NOTE FOR PURCHASE-MONEY: *Perkins v. Gibson*, 151 Miss. 699; 24 Am. Rep. 644.

USURY, TRANSACTIONS TAINTED WITH: See *Valentine v. Conner*, 40 N. Y. 248; 100 Am. Dec. 476, and cases cited in note 481.

ALLEGATIONS AND PROOF THAT WRITTEN CONTRACT IS NOT USURIOUS, where it appears to be so, must be explicit, and clear of all doubt: *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78.

TEAGUE v. LE GRAND.

[85 ALABAMA, 493.]

ATTACHMENT AND GARNISHMENT. — DEMANDS WHICH MAY BE SUBJECTED TO GARNISHMENT PROCESS are such only as the defendant in attachment could himself recover of the garnishee in an action of debt or *indebitatus assumpsit*.

GARNISHMENT. — BALANCE DUE ON SUBSCRIPTION TO STOCK in private corporation, to be paid on call by the board of directors, is not subject to garnishment at law at the suit of a creditor of the corporation when no call has been made.

In this case, Teague, Barnett, & Co. brought suit against the Southern Railway Construction and Land Company, and on the same day sued out process of garnishment against M. P. Le Grand and others as debtors of said corporation. Summons and complaint and the writ of garnishment were each served February 14, 1888, and judgment on verdict was obtained June 25, 1888, by the plaintiffs against the corporation. The garnishee, Le Grand, answered, in substance, that said corporation was organized under the general statutes, May 24, 1886, with a capital stock of ten thousand dollars, in shares of one hundred dollars each, subscriptions payable on call by the board of directors, except twenty per cent thereof, which the subscribers agreed to pay in cash; that the garnishee subscribed for two shares (two hundred dollars), and paid forty dollars in cash to the board of corporators, other subscribers paying the same per cent of their subscriptions; that no call had been made for any part of the unpaid subscriptions before the service of the garnishment in this case, and no call had been made since; that no part thereof, except the said forty dollars, was paid by this garnishee before the service of the garnishment, but since said service, in June, 1888, acting under the advice of counsel, he paid the remainder of his subscription (\$160) to the secretary and treasurer of said corporation, voluntarily and without call; that the corporation has never prescribed the manner or time for payment of installments of subscription to stock; that the corporation is now, and has been ever since the commencement of this suit, insolvent, and has done no business since some time in the year 1887, except to defend suits against it, and that the garnishee was a director in the corporation from its organization, and had knowledge of its insolvency when he voluntarily paid up his subscription. On these facts, the court rendered judgment discharging the garnishee, and the plaintiffs assigned error.

Thorington and Smith, for the appellants.

Roquemore, White, and Long, Tompkins, Troy, and London, Sayre, Stringfellow, and Le Grand, and Graves and Blakey, contra.

STONE, C. J. Garnishment, such as was resorted to in this case, is purely a legal remedy, a species of statutory attachment. When invoked for the purpose of condemning credits, or legal liabilities due to the defendant in the attachment, it is not every species of liability that can be reached. It is such as the defendant in attachment can recover of the garnishee in an action of debt or *indebitatus assumpsit* that are subject to this process: Code 1886, sec. 2976, and note. True, the debt need not be due and presently demandable; but there must be a contract, express or implied, out of which a money liability will certainly spring in the usual course of things. Many contracts from which money liabilities may possibly arise are not subject to garnishment of law: *Jones v. Crews*, 64 Ala. 368; *Hurst v. Home Protection Fire Ins. Co.*, 81 Id. 174; *Levisohn v. Waganer*, 76 Id. 412; *Sec. Loan Ass'n v. Weems*, 69 Id. 584; *Henderson v. Alabama Gold Life Ins. Co.*, 72 Id. 32; *Alexander v. Pollock*, 72 Id. 137; *Nat. Com. Bank v. Miller*, 77 Id. 168; 54 Am. Rep. 50.

The contract on account of which the liability of the garnishee was sought to be fixed and enforced in the present suit was a subscription of capital stock in a private corporation. There was no promise to pay generally, or at any fixed time. The payments were to be made when calls should be made therefor; and there had been no calls. It could not be known that calls ever would be made, and hence no legal liability was shown which would maintain debt or *indebitatus assumpsit*. Chancery might have taken jurisdiction, the corporation being insolvent, and itself made calls, and enforced their collection, for the benefit of creditors: *Glenn v. Semple*, 80 Ala. 159; 60 Am. Rep. 92. A common-law court—the more especially under statutory garnishment—is without the power to do so.

The garnishment being unauthorized because there was no debt subject to such process, it fastened neither lien nor claim on the sum subscribed. In no sense did the court obtain control of it so as to hamper or abridge the power of the parties to dispose of or adjust it, subject always to the claims of creditors, properly asserted, if it was not paid in good faith.

Affirmed.

GARNISHMENT, WHAT CLAIMS SUBJECT TO: See *Mims v. West*, 38 Ga. 18; 95 Am. Dec. 379; *First National Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53. It is only a debt due in money that can be garnished. A debt or note for specific articles cannot be garnished: *Weil v. Tyler*, 38 Mo. 545; 90 Am. Dec. 441, and note 443.

LOUISVILLE AND NASHVILLE R. R. Co. v. REESE.

[85 ALABAMA, 497.]

RAILROAD COMPANIES — NEGLIGENCE. — MERE FACT THAT PROPERTY IS DESTROYED OR DAMAGED BY FIRE ORIGINATING from sparks emitted from locomotive is not sufficient to fasten a liability upon the railroad company, but proof of that fact raises a presumption of negligence, consisting in a defect in the construction of the locomotive, or in the appliances used to prevent accidents from escaping sparks, or in want of care in its management, and casts on the company the burden to rebut the presumption.

ACTION by Albert Reese against the Louisville and Nashville Railroad Company, to recover damages for injuries caused by fire, charged to have originated from sparks emitted from an engine running on the defendant's road. The opinion states the case.

Jones and Falkner, for the appellant.

J. C. Richardson and John Gamble, contra.

CLOPTON, J. On the trial of this action, which was brought by appellee to recover for injuries suffered by the escape of fire from an engine, the defendant requested the court to charge the jury that the burden of proof is upon plaintiff to show that the fire was caused by the negligence of defendant, and that evidence tending to show that it was caused by sparks from defendant's engine, without evidence tending to show that such escape of fire was the result of negligence on the part of defendant, is not sufficient to entitle plaintiff to recover. The defendant also requested the court to further instruct the jury that the negligence of defendant will not be presumed from the mere fact that the fire was caused by sparks escaping from defendant's engine.

On the question presented by these charges, the authorities are in manifest and decided conflict.

Many of them, probably the greater number, maintain the rule that an inference of negligence does not arise from the mere fact of fire being communicated by a passing locomotive, and that the *onus* is on the plaintiff to prove, in addition to the

origin of the fire, some positive act of negligence on the part of defendant, or circumstances tending to show a want of due care. The following authorities may be cited as sustaining this doctrine: *Gandy v. Chicago etc. R. R. Co.*, 30 Iowa, 420; 6 Am. Rep. 682; *Philadelphia etc. R. R. Co. v. Yerger*, 73 Pa. St. 121; *Indianapolis etc. R. R. Co. v. Paramore*, 31 Ind. 143; *McCaig v. Erie R'y Co.*, 8 Hun, 599; 1 Wharton on Evidence, sec. 360; 13 Am. & Eng. R. R. Cas. 488, note. The most cogent reasons given for the support of this rule are, that a railroad company which is authorized by law to operate its trains by steam is not an insurer against accidents by fire, and is not liable for injuries caused by the use of fire in generating steam, if the right is exercised in a lawful manner and with reasonable care and skill; and the owner of adjacent property assumes all risks incident to a lawful and proper use of the road; that negligence is the gist of the liability, without proof of which an action cannot be maintained; and by the general rule in actions founded on negligence, the plaintiff must aver it, and the burden of proof rests upon him, and in no case does the mere fact of injury prove negligence.

The converse rule is, that proof of the mere fact that property was destroyed or damaged by fire having escaped from a passing engine is *prima facie* evidence of negligence in the construction and management of such engine, and casts on the defendant the burden to rebut the presumption. The following authorities may be cited as sustaining this rule: *Burlington etc. R. R. Co. v. Westover*, 4 Neb. 268; *Karsen v. Milwaukee etc. R'y Co.*, 29 Minn. 12; *Illinois Central R. R. Co. v. Mills*, 42 Ill. 407; *Coates v. Missouri etc. R'y Co.*, 61 Mo. 38; *Burke v. Louisville etc. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618; *Case v. North Central R'y Co.*, 59 Barb. 644; *Spaulding v. Chicago etc. R'y Co.*, 30 Wis. 110; 11 Am. Rep. 550; Shearman and Redfield on Negligence, sec. 333; *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71, note; 1 Thompson on Negligence, 153. These decisions base the rule mainly upon the necessity of the case. The argument is clearly and forcibly stated by Dixon, C. J., in *Spaulding v. Chicago etc. R'y Co.*, *supra*. After observing that it is the duty of railroad companies to employ all due care and skill in the construction of their engines to prevent injury to the property of others by the escape of fire therefrom, he says: "The reasons given for requiring the companies to show that this duty has been performed on their part are, that agents and employees

of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and cannot be obtained by them, without great trouble and expense."

It is an exception to the general rule, that a mere damage or destruction by fire does not, of itself, authorize an inference of negligence. The soundness and justice of the exception, in cases of fire caused by steam-engines, may be rendered apparent by observing its qualification and operation. We do not understand that, in actions for injuries caused by negligent escape of fire from a railroad engine, it operates or is intended to abrogate or modify the general rule, which makes it incumbent on the plaintiff, in the first instance, to establish a *prima facie* case, or to devolve on the defendant the burden of doing more than disproving the *prima facie* case shown by the plaintiff. Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others; as has often been said, a high degree of care. Reasonable care, however, does not require the adoption of every new invention or contrivance which science may or can suggest, as to the utility of which men equally skilled may differ. They fulfill the measure of their duty in this respect by adopting such appliances and contrivances as are in practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty, they are not liable for accidental injuries caused by the escape of fire from their engines. The mere fact that a fire originated from sparks emitted from an engine is not sufficient to fasten a liability on the company; neither does the rule so operate. It is not a rule of liability, but of evidence. Though no mechanical contrivance has been invented or is in use which can effectually prevent the escape of fire from locomotives at all times and under all circumstances, from which injury may result, experience has demonstrated that fire rarely escapes in such quantity or volume as to cause damage when the engines are properly constructed, are sup-

plied with the most improved appliances for preventing the escape of fire, and are managed with care. On the advanced progress in mechanical appliances, and the practical demonstration of their utility and efficiency, a reasonable inference may arise, when fire originates from sparks emitted by a locomotive in sufficient quantity or volume to occasion damage, that the engine is not properly constructed, or that it has not the improved appliances, or is not managed with care. When the inference is repelled by proof of the proper construction of the engine, and use of the proper appliances, and careful management, the plaintiff cannot maintain the action without making proof of other negligence or want of care. The extent of the rule is, that injury caused by fire escaping from an engine is a circumstance from which the inference of negligence in construction and management of the engine may be reasonably drawn, but negligence in no other respect. It is the application of the general principle that presumptive evidence is founded on the connection which experience has demonstrated to exist between the facts proved and the facts intended to be proved. We think the rule that the destruction or damage of property by fire escaping from a railroad engine raises an inference of negligence, consisting in a defect in its construction, or in the appliances used, or want of due care in its management, a sound and just rule, and, as thus limited and qualified, will more effectually accomplish the protection of property and the ends of the law.

The same observations apply to all the charges requested by defendant. On the assumption that the fire originated from sparks emitted from the engine, they put on plaintiff the burden to show that the engine was not properly managed, or that the spark-arrester was not in good order, in view of the evidence that the spark-arresters used by defendant would last only from three to twelve months, and of the absence of proof that the particular engine had ever been inspected, and of the manner in which the engine was managed,—facts peculiarly within the knowledge of defendant, with the means and opportunity of proof.

Affirmed.

LIABILITY OF RAILROAD COMPANY FOR FIRE COMMUNICATED BY LOCOMOTIVE ENGINES — PRESUMPTION AS TO NEGLIGENCE: See *Gulf etc. R'y Co. v. Benson*, 69 Tex. 407; 5 Am. St. Rep. 74, and note 77; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 387; 73 Am. Dec. 656, and note 658; *Ohio etc. R. R. Co. v. Shanefelt*, 47 Ill. 497; 95 Am. Dec. 504, and note 508.

CLAY v. POWELL.

[85 ALABAMA, 538.]

INJUNCTION. — **BILL IN EQUITY WILL LIE AT SUIT OF LESSEE, WHO CLAIMS EXCLUSIVE RIGHT** to carry on a particular business on the leased premises, to restrain, by injunction, another lessee, having notice of the complainant's right, from so using his own rented premises as wrongfully to disturb such right. But the lessee defendant having subleased to another, allowing him to carry on the business in violation of the complainant's exclusive right, a temporary injunction, as against said lessee, is properly dissolved, when not kept in force by the complainant against the sublessee, who actually carried on the business.

C. F. Hamill and W. L. Clay, for the appellant.

SOMERVILLE, J. The complainant, Clay, claims to be the exclusive owner, by purchase, of the right to sell tobacco and cigars in the office of the Florence Hotel, in Birmingham, Alabama, for the space of twelve months from October, 1886. With this privilege he also rented from Jackson and McCurdy, proprietors of the hotel, sufficient space in the office to carry on this business, and proceeded openly to carry it on in exercise of his right.

The purpose of the bill is to enjoin the defendant, Hugh L. Powell, and his sublessees, Foster Brothers & Co., from any wrongful disturbance of the complainant's easement. It is alleged that Jackson and McCurdy, who are also made defendants to the bill, had, after their agreement with complainant, cut off a space in the hotel office, separating it by a partition of wood and glass, and connecting it by a front entrance with Nineteenth Street, and had rented it to Powell, to be used by him as a railroad supply store; and that Powell, being himself interested in the business, had allowed the defendants, Foster Brothers & Co., to carry on the business of selling cigars and tobacco on the rented premises, with notice of complainant's easement, thus injuriously competing with complainant's business, and interfering with his exclusive right.

It is not denied that the bill has equity, as one in the nature of specific performance, to prevent a sublessee from making an improper use of the rented premises, in violation of an agreement of which he has notice; and also for the protection of an easement by the terms of which the complainant is entitled to the enjoyment of an exclusive privilege. The bill is maintainable, in part, upon the principles analogous to those governing the equitable remedy of specific performance,

and in part upon "the necessity of preventing a constantly recurring grievance, resulting from the continuous breach of the covenant, which cannot be adequately compensated by an action for damages": *Maddox v. White*, 4 Md. 72; 59 Am. Dec. 67, and note 70, 71; 2 High on Injunctions, 2d ed., secs. 1150, 1151; *Parkman v. Aicardi*, 34 Ala. 393; 73 Am. Dec. 457; 2 Pomeroy's Eq. Jur., secs. 614, 625, 689; 3 Id., sec. 1342; *Barret v. Blagrove*, 5 Ves. Jr. 556; Wade on Notice, secs. 289, 300; *Manhattan Mfg. Co. v. New Jersey Stock Yard etc.*, 23 N. J. Eq. 161; *Frank v. Brunnemann*, 8 W. Va. 462.

The appeal is taken from an interlocutory decree dissolving a preliminary injunction granted by the chancellor restraining the defendants from interfering with or disturbing the easement claimed by the complainant. This was done on the denial, in the answer of Hugh L. Powell, of the allegations on which rested the equity of the bill. There is no assignment of error based on the action of the chancellor dissolving the injunction against Foster Brothers & Co., and hence no question is raised by the record as to the correctness of that ruling.

The injunction against the defendant, Hugh Powell, was based on the theory that he had some interest in or power of control over the business of Foster Brothers & Co., and that he had the legal authority to revoke a mere license given to them to sell cigars and tobacco on the premises occupied by them. A precedent for such an injunction is found in *Altman v. Royal Aquarium Soc.*, L. R. 3 Ch. Div. 228, where the complainant, having the exclusive right to sell and exhibit certain foreign wares on the premises of the defendant society, was restrained by injunction "from permitting or neglecting to prevent" the sale or exhibition of goods by other persons in violation of the complainant's right: 2 High on Injunctions, sec. 1151. But an interlocutory injunction cannot be resorted to for the purpose of divesting vested rights, or taking property from the possession of one person and putting it in the possession of another, or of undoing what has already been done, since "it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains." The jurisdiction, therefore, as observed by Mr. High, "being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done on an interlocutory application for an injunction, courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of, and preserve matters *in statu quo*": 1 High on Injunctions, sec. 4.

The explicit denial by Hugh L. Powell of all interest in the business of Foster Brothers & Co., and of all power of control over them in conducting it, and the statement of facts made in the answer in support of this conclusion, all go to a direct denial of allegations in the bill, the truth of which is essential to the maintenance of the injunction against this particular defendant. Conceding that he is chargeable with notice of the complainant's rights, by reason of complainant's open and continuous occupancy of the premises, the wrong done by Powell, if any, was creating the easement in favor of Foster Brothers & Co., which was by contract for a definite time, in fraud of the complainant's exclusive privilege already granted by the hotel proprietors. The defendant could not be compelled by preliminary injunction to interfere with Foster Brothers & Co., so as to prevent them from exercising a right which he had sold them, in connection with the right of occupying the premises to carry on their business. He might thus subject himself to an action of trespass, and a court of equity will not compel one defendant by injunction to commit a trespass on another. The remedy is rather to extend its preventive arm, so as to enjoin the party who threatens to continue the use of his title wrongfully acquired through a breach of contract, trust, or confidence, to the prejudice of the complainant.

The remedy of the appellant was to keep in force his injunction against Foster Brothers & Co., the parties themselves who were actually carrying on the business of selling cigars and tobacco in disturbance of his alleged easement: *Jones v. Ewing*, 56 Ala. 360; Code 1886, sec. 3524. This he has failed to do; and in the absence of any assignment of error, based on the action of the chancellor in this matter, he is without remedy in this court.

There was no error in dissolving the injunction against Hugh L. Powell, and the decree is affirmed.

INJUNCTION, WHEN BREACH OF CONTRACT RESTRAINED BY: *Hall's Appeal*, 60 Pa. St. 458; 100 Am. Dec. 584; *Beard v. Dennis*, 6 Ind. 200; 63 Am. Dec. 380. Injunction will lie to restrain breach of covenant not to carry on a certain kind of business in a certain place: *Guerand v. Dandeleit*, 32 Md. 561; 3 Am. Rep. 164.

OWNER OF LAND, OF WHICH ANOTHER HAS TAKEN UNAUTHORIZED POSSESSION, cannot have him enjoined from making a legal use of the premises, although it is one of which the landlord disapproves: *Bothwell v. Crawford* 26 Kan. 292; 40 Am. Rep. 306.

EAST BIRMINGHAM LAND COMPANY v. DENNIS.

[85 ALABAMA, 565.]

NEGOTIABLE INSTRUMENTS. — BONA FIDE PURCHASER OF NEGOTIABLE BILL, BOND, OR NOTE, ACQUIRES GOOD TITLE THERETO, although he buys from a thief, if he pays value for it without notice of the infirmity of his vendor's title.

CERTIFICATE OF CORPORATE SHARES OF STOCK, IN ORDINARY FORM, IS NOT NEGOTIABLE PAPER, notwithstanding a custom or usage among stock-brokers to the contrary; and an innocent purchaser for value of such certificate, although indorsed in blank by the owner, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner.

BILL in equity by J. F. Dennis against J. P. Mudd, and the East Birmingham Land Company, a private corporation, seeking to compel the transfer, on the books of the corporation, of a certificate for ten shares of stock, which the complainant claimed to own, and to compel its surrender to him by said Mudd, who held it under claim of ownership. The certificate was issued in the name of one Dearborn, and indorsed by him in blank, and the complainant claimed that he had bought the certificate from a holder who had bought it from Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate, for full value, from stock-brokers in Birmingham, and, while denying complainant's ownership, claimed that he acquired title by the custom and usage of brokers and merchants in that city. A decree *pro confesso* was taken against the corporation. On final hearing, the court rendered a decree for the complainant, which the defendants separately assigned as error.

S. D. Weakley, for the appellants.

W. R. Houghton, *contra*.

SOMERVILLE, J. We concur in the conclusion reached by the judge of the city court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession, without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it, some time in March, 1888.

The only question is, whether Mudd, who paid full value for this stock without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is, that no person can ordinarily be deprived of his ownership of property save by his own consent, or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking-house, whence it was abstracted by some unknown person, apparently without any fault on his part.

Nor does any question arise involving the rights of a subsequent *bona fide* purchaser of stock, from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors, or purchasers without notice": Code 1886, sec. 1671; *Fisher v. Jones*, 82 Ala. 117. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant, Dennis, himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled that a *bona fide* purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or

his authority to make the sale. This question arose, and was decided by the New York court of appeals, in *Mechanics' Bank v. New York and New Haven R. R. Co.*, 13 N. Y. 599. It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be, in some respects, like a bill of lading, or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is, that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks, . . . so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of *Sewall v. Boston Water Power Co.*, 4 Allen, 282, 81 Am. Dec. 701, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Savage Mining Co.*, 64 Cal. 388, 49 Am. Rep. 705, where it was expressly held that a *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows: "But if the purchaser from

one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading in *Gurney v. Behrend*, 3 El. & B. 622, decided by the English queen's bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value; and it was held by Lord Campbell that for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of *Barstow v. Savage Mining Co.*, *supra*, is well supported by authority, and in our judgment announces a correct principle of law, and we fully approve it: *Wooley v. Sergeant*, 8 N. J. L. 262; 14 Am. Dec. 419, note 427, and cases there cited; Cook on Stock and Stockholders, secs. 7, 10, 192, 368, 437; 2 Daniel on Negotiable Instruments, 3d ed., sec. 1708 g. It harmonizes entirely with the declaration of our statute that shares of stock in private corporations "are personal property, transferable on the books of the corporation," in accordance with the rules and regulation of the corporation: Code 1886, sec. 1669; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351.

There is a class of cases not to be confounded with the one in hand, where the holder of such a certificate of stock indorsed in blank is clothed with power as agent or trustee to deal with such stock to a limited extent, and transfers it by exceeding his powers or in breach of his trust. In such cases it has often been held that the true owner, having conferred on the holder, by contract, all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person who, acting in good faith, acquires it for value from the apparent owner": 2 Daniel on Negotiable Instruments, 3d ed., sec. 1708 g; *McNeil v. Tenth National Bank*, 46 N. Y. 325; 7 Am. Rep. 341; *Mount Holly Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 Id. 479; *Merchants' Bank v. Livingston*, 74 N. Y. 223. These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver rather than a stranger who has been negligent in trusting no one: *Allen v. Mauray*, 66 Ala. 10.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock-brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract: *Dickinson v. Gay*, 83 Am. Dec. 656, and note 664; *East Tennessee etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Lehman v. Marshall*, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

CERTIFICATE OF STOCK NOT NEGOTIABLE INSTRUMENT: *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107.

PURCHASER OF CORPORATE STOCK, WITH NOTICE OF TRUST IN FAVOR OF THIRD PERSON, takes nothing as against the *cestui que trust*: *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291, and see note 297.

STOLEN NEGOTIABLE SECURITIES, RIGHT OF OWNER TO FOLLOW PROCEEDS: *Newton v. Porter*, 69 N. Y. 133; 25 Am. Rep. 152.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

DRIGGS AND COMPANY'S BANK v. NORWOOD.

[50 ARKANSAS, 42.]

USE OF WIFE'S MONEY BY HUSBAND WITH HER CONSENT. — Where a husband collects his wife's money, and, without objection on her part, uses it as his own for more than ten years, obtaining credit on the faith of its being his own, she cannot afterwards assert her claim to it or to its proceeds against his creditors.

VOLUNTARY ALIENATION OF HIS PROPERTY BY EMBARRASSED DEBTOR IS PRESUMPTIVELY FRAUDULENT as against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency. But a voluntary conveyance by a person in debt is not *per se* fraudulent as to subsequent creditors; to make it so they must prove actual or intentional fraud.

PROPERTY CONVEYED TO WIFE, WHEN SUBJECTED TO SATISFACTION OF HUSBAND'S DEBTS. — Where a husband makes a voluntary post-nuptial settlement upon his wife, by having conveyed to her real estate exceeding in value the rest of his property, at a time when he is largely insolvent as an individual, and the firm of which he is a member is on the brink of ruin, the deed to her not being acknowledged by the grantor so as to entitle it to record until about two years after its execution, and after the commencement of a suit by his creditors to subject the property to the satisfaction of their debt, and where, shortly after the transfer, his firm contracts a debt of considerable magnitude to the creditors seeking to subject the property to the satisfaction of their debt, at a time when he had no reasonable ground to believe that he would be able to pay the same, the transaction wears the badge of fraud, and the property so conveyed will be subjected to the payment of the debts of said creditors.

BILL to subject property to satisfaction of the plaintiffs' debt. The opinion states the facts.

Atkinson and Tompkins, for the appellants.

Montgomery and Hamby, for the appellees.

SMITH, J. The bill alleged that the plaintiffs, Driggs & Co., had recovered judgment against Norwood, as a member of the firm of Nelson & Co., for more than twelve hundred dollars, and had taken out execution thereon, which was returned unsatisfied; that Norwood had bought a lot in the town of Prescott, and for the purpose of cheating and hindering his creditors, had caused the deed to be made to his wife. The prayer was for the subjection of the property to the satisfaction of the plaintiffs' debt.

The defendants filed a joint answer, in which they denied any fraud in the transaction, and averred that the lot was purchased and paid for with the wife's own money. The bill was dismissed at the hearing.

The testimony developed these facts: Norwood was a country physician with a limited practice, and utterly without means, until, in the year 1869, he married a widow, who had an interest in her deceased husband's estate. From this source he received fifteen hundred dollars. He invested eight hundred dollars in a farm, taking the title in his own name, and lent such part of the remainder as was not consumed in the support of the family, upon interest. He seems to have enjoyed a reasonable share of prosperity, cultivating his farm and practicing his profession, until the year 1882, when he removed to Prescott, the county seat of his county. He was then the owner of another small farm, in addition to the one previously mentioned, was free from debt, and had one thousand dollars or more due to him in notes and accounts. He was regarded by his neighbors as a man in easy circumstances. About this time he was induced to sign a bond of five thousand dollars; and the condition of the bond not having been performed, he and two others of the sureties made their joint note for sixteen hundred dollars in adjustment of their liability. This note had not been paid down to the taking of the proofs in this cause, and an action was pending in the courts upon it. In the course of the complications growing out of this bond, and as soon as it was ascertained that the sureties were in for a loss, Norwood made a suspicious transfer of the smaller of his two farms and of his book-accounts to a friend in Prescott. In the fall of 1882 he also sold the other farm, and about the 1st of October in that year was admitted as a partner in the mercantile firm of Nelson & Co.

On November 18, 1882, he became surety on the bond of the postmaster at Prescott, and made oath that he was worth

one thousand dollars over and above all debts, liabilities, and exemptions. On November 21, 1882, occurred the transaction which is the subject of this controversy; viz., the purchase of the town lot for \$360, and the conveyance of it to his wife. A few days afterwards,—not later than the 1st of December following,—Norwood's firm failed in business, or was closed out by creditors. The plaintiffs recovered their judgment on September 4, 1884. It does not appear from the record when their debt was created. It is probable that it was before the date of the conveyance, which is attacked herein as fraudulent; since, as we have seen, the firm of Nelson & Co. failed very shortly afterwards. The plaintiffs were bankers at Prescott, and it would be strange if the firm of Nelson & Co. could have obtained so large a credit on the verge of insolvency or after insolvency. Still, on this point of the exact date of the accrual of the debt there is neither allegation nor proof, and the plaintiffs must accordingly be treated as subsequent creditors.

The money which Norwood collected for his wife was rightfully hers, and could have been secured to her use by an investment in real estate in her own name, or by an investment in personal property, a schedule of which was recorded in the county of her residence; or possibly, if it was desirable to keep it in money or choses in action, by holding it separately from that of her husband. It was her separate property so long as she chose to preserve its distinctive character, and did not intrust its management or control to him otherwise than as an agent: *Beeman v. Couser*, 22 Ark. 429; Constitution of 1868, art. 12, sec. 6; *Humphries v. Harrison*, 30 Ark. 79; *Hydrick v. Burke*, 30 Id. 124.

There is nothing to show that Norwood, in the investments he made, acted as his wife's agent. On the contrary, he purchased lands for his own benefit, and dealt with her money as his own for a period of more than ten years, and obtained credit on the faith of its being his own. Mrs. Norwood is not shown to have objected to such use, and her assent must be presumed. It is now too late to assert her claim to the money or its proceeds against her husband's creditors: 2 Perry on Trusts, sec. 678; Schouler on Domestic Relations, 3d ed., sec. 119; *Humes v. Scruggs*, 94 U. S. 22.

If the plaintiffs' debt was in existence when the transfer was made, there could not be any doubt of their right to impeach it. For every voluntary alienation of his property by

an embarrassed debtor is presumptively fraudulent against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency. But as to subsequent creditors, a voluntary conveyance by a person in debt is not *per se* fraudulent. To make it so, proof of actual or intentional fraud is required: *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17, and notes; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Mattingly v. Nye*, 8 Wall. 370; *Wallace v. Penfield*, 106 U. S. 260; *Payne v. Stanton*, 59 Mo. 159; *Reade v. Livingston*, 3 Johns. Ch. 501; 8 Am. Dec. 520; *Mittelbury v. Harrison*, 11 Mo. App. 136, affirmed on error, 90 Mo. 444.

The cases have always made this distinction between the two classes of creditors, as to the burden and quantum of proof. But in the text-books and in the decided cases there is some obscurity, and perhaps conflict, as to what are the frauds of which subsequent creditors may take advantage. Where the fraud is directed specifically against them, as where a voluntary settlement is made with a view to becoming subsequently indebted, there can be no difficulty. Such a case was *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733, where the judgment debtor, being engaged in an extensive business and already considerably indebted, stripped himself of the title to all his property by transfer to his wife and children, with the intent to contract a future indebtedness on the credit of his apparent ownership of the property transferred, of which he still remained in possession.

But is it necessary in every such attack to show a specific intent to defraud future creditors? Or may the transfer be avoided at the suit of a subsequent creditor on proof that it was a fraud upon the rights of previous creditors?

In *Toney v. McGehee*, 38 Ark. 427, it was said: "A voluntary conveyance may be impeached by a subsequent creditor, on the ground that it was made in fraud of existing creditors; but to do so, he must show either that actual fraud was intended, or that there were debts still outstanding which the grantor owed at the time he made it."

As we have stated above, a creditor who assails a conveyance of his debtor's property, made before the creation of his debt, must show fraud in fact. Existing indebtedness is not conclusive, but only a circumstance from which the fraudulent intent may be inferred: *Pepper v. Carter*, 11 Mo. 543; *Rose v. Brown*, 11 W. Va. 134.

In *Cunningham v. Williams*, 42 Ark. 170, it was said that

the intention must have been to put the property beyond the reach of debts which the settler intended thereafter to contract, and which he did not intend to pay, or had not reasonable expectation of being able to pay: Compare 1 Am. Lead. Cas., 5th ed., *40 et seq.; Wait on Fraudulent Conveyances, c. 6; Bump on Fraudulent Conveyances, c. 13; *Graham v. Railroad Co.*, 102 U. S. 148; *Horbach v. Hill*, 112 Id. 144; *Reade v. Livingston*, 3 Johns. Ch. 497; 8 Am. Dec. 520; *Shand v. Hanley*, 71 N. Y. 319; *Parkman v. Welch*, 19 Pick. 237; *Day v. Cooley*, 118 Mass. 527; *Claflin v. Mess*, 30 N. J. Eq. 211; *Johnson v. Skaggs*, Court of Appeals Ky., Jan. 1887.

But whether it be sufficient for the subsequent creditor to prove that the conveyance was intended to defraud existing creditors, or whether he must prove that it was executed as a cover for future schemes of fraud, the deed under consideration must be condemned. It was a voluntary post-nuptial settlement by Norwood upon his wife. He was at that time, according to his own account, largely insolvent as an individual, and the firm of which he was a member was on the brink of ruin. The amount he settled upon his wife exceeded in value the rest of his property. The deed to the wife was never acknowledged before an officer by the grantor, until about two years after its execution and since the commencement of this suit. Without acknowledgment it could not be recorded. The possession of the property and the concealment of the transfer may have enabled Norwood to obtain a false credit. And shortly after the transfer, his firm contracted a debt of considerable magnitude to the plaintiffs, which they had no reasonable grounds to believe they would be able to pay. The transaction wears the badge of fraud.

The decree is reversed and the cause remanded, with directions to grant to the plaintiffs the relief they pray for.

USE AND CONTROL OF WIFE'S SEPARATE PROPERTY BY HUSBAND: *Dean v. Bailey*, 50 Ill. 481; 99 Am. Dec. 533, and note 536; *Feller v. Alden*, 23 Wis. 301; 99 Am. Dec. 173, and note 177.

IF WIFE INTRUSTS HER FUNDS TO HER HUSBAND'S MANAGEMENT, and he, being a member of a business firm, uses such funds in its affairs without any express promise to repay them, she cannot, on the subsequent insolvency of the firm, be regarded as one of its creditors, and as such entitled to a dividend out of its assets: *Jenkins v. Middleton*, 68 Md. 540. Neither does she acquire any claim against her husband's estate when he uses her money, with her acquiescence, in his business, unless at the time of receiving or using such money he expressly promised to repay it: Id. Money given wife domiciled with her husband in Tennessee, which he reduced to his possession there, became his property, and so remained after their removal from that

state: *Thorn v. Weatherby*, 50 Ark. 237. Voluntary advancements by a wife for family support or for her husband's use in business, with no contract to repay it, is not a valid consideration as against existing creditors for a conveyance from husband to wife: *Hauson v. Manley*, 72 Iowa, 48.

GIFT FROM WIFE TO HUSBAND IS PRESUMED, where she permits him for ten years to manage her property, receive the rents and profits, and expend the surplus, without question: *McLure v. Lancaster*, 24 S. C. 273; 58 Am. Rep. 259, and note 261.

CONVEYANCE — PRESUMPTION OF FRAUD FROM RELATIONSHIP OF PARTIES. — Relationship of the parties to a conveyance is not of itself a badge of fraud; but it is a fact which naturally awakens suspicion, lends greater weight to other unfavorable circumstances, and renders necessary more complete and distinct proof of the consideration and fairness of the transaction: *Robinson v. Frankel*, 85 Tenn. 475. If a debtor buys lands, and with intent to defraud his creditors takes title in the name of a third person, from whom the debtor afterwards obtains a conveyance, and then conveys a portion of the same land to his wife in consideration of the release of her dower in other lands, this latter conveyance will be sustained against the judgment creditors both of the husband and of the person in whose name the original deed was fraudulently taken, if the wife was ignorant of her husband's indebtedness and of the fraud under which he acquired title to the land: *Keel v. Larkin*, 83 Ala. 142; 3 Am. St. Rep. 702. Voluntary post-nuptial settlement upon wife is presumptively fraudulent as to existing creditors of her husband; and such settlement of all his property upon wife is absolutely void as to his existing creditors and subsequent *bona fide* purchasers from him without notice: *Adams v. Edgerton*, 48 Ark. 419. Husband has clear right to prefer his wife over his other creditors at any time: *Cornell v. Gibson*, 114 Ind. 144; 5 Am. St. Rep. 605; *Brigham v. Hubbard*, 115 Ind. 474; *Sims v. Moore*, 74 Iowa, 497. Conveyance without consideration upon a secret trust, or upon reservation for benefit of grantor, or to some person without interest therein, may be set aside, no matter what intent of grantee may be: *Lyons v. Leahy*, 15 Or. 8; 3 Am. St. Rep. 133. Where insolvent grantor conveyed to business partner, and partner to grantor's brother, each conveyance being made without consideration, and with full knowledge of the facts, and the grantee borrowed a sum of money on the property equivalent to one fourth of its value, which he gave to the original grantor, to be used in paying certain of the latter's creditors, the transactions were pronounced fraudulent and void as against creditors of the original grantor, and the conveyances were not even allowed to stand as security for the money advanced by the last grantee: *Id.* Where a husband conveys to his wife with intent to defraud her father, who had loaned husband large sums of money, supposing him to be wealthy, such conveyance is fraudulent, even though the father, prior to knowledge of husband's insolvency, requested such conveyance to be made to secure property to his daughter: *Taylor v. Branscombe*, 74 Iowa, 535. Wife is a trustee for husband's creditors, where husband gives her money or expends money on her estate to defraud his creditors, she giving no consideration, and knowing of intent to defraud: *Blair v. Smith*, 114 Ind. 114; 5 Am. St. Rep. 593.

FRAUD CANNOT BE INFERRED FROM MERE FACT THAT TWO CONVEYANCES WERE EXECUTED, when one would have answered: *Nance v. Nance*, 84 Ala. 375; 5 Am. St. Rep. 378. See *York County Bank v. Carter*, 38 Pa. St. 446; 80 Am. Dec. 494.

MARRIAGE SETTLEMENT, VALIDITY OF AS AGAINST HUSBAND'S CREDITORS: *Merritt v. Scott*, 6 Ga. 563; 50 Am. Dec. 365, and note 371-375; *Houghton v.*

Houghton, 14 Ind. 505; 77 Am. Dec. 69, and note; *Nance v. Nance*, 84 Ala. 375; 5 Am. St. Rep. 378; *National Exchange Bank v. Watson*, 13 R. I. 91; 43 Am. Rep. 13; *Herring v. Wickham*, 29 Gratt. 628; 26 Am. Rep. 405; *McGowan v. Hitt*, 16 S. C. 602; 42 Am. Rep. 650.

HALL v. LACKMOND.

[50 ARKANSAS, 113.]

EXECUTION ISSUED WITHOUT OFFICIAL SEAL MAY BE AMENDED by order of court requiring the clerk to affix the seal, and the amendment will have relation to the date of the writ. And the power of the court to amend the writ is in no way affected by the fact that a bond is given to stay proceedings under the execution, during the pendency of an application to quash it for want of the seal.

COSTS OF PROCEEDING MAY BE ADJUDGED AGAINST PARTY MOVING TO QUASH WRIT OF EXECUTION, on the ground that it was issued without affixing the clerk's seal thereto.

APPEAL. The opinion states the case.

Scott and Jones, for the appellant.

A. B. and R. B. Williams, for the appellee.

COCKRILL, C. J. The clerk of the Hempstead circuit court issued execution upon a judgment rendered in favor of the appellee, against the appellant, without attaching his seal of office to the writ. It was levied by the sheriff upon the appellant's personal property, but upon application to the circuit judge, and the execution of a bond under section 2988, Mansfield's Digest, proceedings under the execution were stayed until the next term of the circuit court, when, upon the motion of the appellee, the clerk was required to affix his seal, and the appellant's application to quash the writ was thereupon denied.

The argument of the appellant is, that inasmuch as his proceeding is a direct attack upon the writ, the court erred in refusing to quash it; and to sustain the position he cites the early cases in our reports, where writs without seal were declared nullities.

As early as *Whiting v. Beebe*, 12 Ark. 421, and *Mitchell v. Conley*, 13 Id. 414, the error of the early cases was made manifest, and the inherent power of the courts to amend their writs, both original and judicial, when defective only in the want of a seal or other matter of form, was declared. The doctrine of these cases has been often reiterated, both in direct and collateral attacks upon writs: *Kahn v. Kuhn*, 44

Ark. 404; *Rice, Stix, & Co. v. Dale and Richardson*, 45 Id. 34; *Jett v. Shinn*, 47 Id. 373, and cases cited therein.

The argument that the amendment cannot have relation to the date of the writ, because the sureties in the bond to stay the execution will be injuriously affected, is without foundation. The fact that the writ is capable of amendment shows that it is not void, but that the defect is cured by relation to its date: *Sannoner v. Jacobson*, 47 Ark. 31; and "it has been held, upon full consideration, that the courts have power to amend their process and records, notwithstanding such amendment may affect existing rights": *Tilton v. Cofield*, 93 U. S. 163, quoted in *Sannoner v. Jacobson*, *supra*. But what rights have the sureties in the injunction bond that are affected by the amendment? They knew, or are presumed to have known, that if they did not lend their aid in interfering with the execution of the writ, it would prove effective to the plaintiff in the execution in holding the property levied upon; and they executed the bond with the knowledge that the court might, if a proper case was presented, exercise its power of amendment. The execution of a bond by them could not defeat the power. The appellant has only to return to the sheriff the property released by the bond, to relieve his solicitude about his sureties.

It is contended that the costs of the application to quash the writ should have been adjudged against the plaintiff in the execution when the amendment was made. The court may impose terms when it sees fit, upon the allowance of an amendment. It declined, in this case, to do so. It was the fault of the clerk, and not of the appellee, that the seal was not attached to the writ, and the court might have caused the amendment without waiting for the suggestion to come from the appellee: *Kahn v. Kuhn*, *supra*. The defect did not affect any substantial right of the appellant; the stay of the execution was unnecessary, and was for his benefit, and it was not an abuse of discretion to adjudge the costs against him.

Affirmed.

EXECUTION MAY BE AMENDED in matters of form and as to clerical errors and omissions, but it cannot be amended as to matters of substance: *Blanks v. Rector*, 24 Ark. 496; 88 Am. Dec. 780; and see *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275, and note; *Hunt v. Loucks*, 58 Cal. 372; 99 Am. Dec. 404; *McCormick v. Wheeler*, 36 Ill. 114; 85 Am. Dec. 388.

WRIT OF EXECUTION MAY BE AMENDED, where it has no seal, by the court's ordering the seal to be affixed: *Corwith v. State Bank*, 18 Wis. 560; 86 Am. Dec. 763.

ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAIL-
WAY v. HARPER.

[50 ARKANSAS, 157.]

DEPOSITION OF WITNESS CONVICTED OF MURDER AFTER IT WAS TAKEN becomes incompetent by his conviction, and cannot be admitted after his execution, although it was read on a former trial had before his conviction.

ACTION for personal injuries. The opinion states the case.

Dodge and Johnson, for the appellant.

J. D. Cook, and A. B. and R. B. Williams, for the appellee.

COCKRILL, C. J. Harper recovered judgment against the railroad for a personal injury, but on appeal to this court it was reversed and a new trial ordered: 44 Ark. 524. Deno Casat's deposition was read on the first trial, and the verdict was based in the main upon that evidence. The deposition had been taken while Casat was confined in the Pulaski County jail on a charge of murder. On the second trial the defendant objected to the use of Casat's testimony, upon the ground that since the first trial he had been convicted of a capital offense. The production of the record of conviction was waived, and it was agreed that Casat had been convicted of murder in the first degree in the Pulaski circuit court, and executed since the first trial. The court permitted the deposition to be read as evidence to the jury, the verdict was for the plaintiff, and the company appealed.

The question is, Did the court err in receiving Casat's testimony? If Casat had been offered as a witness after his conviction, his testimony could not have been received. The conviction rendered him infamous, and disqualified him to testify: Mansfield's Digest, sec. 2859; *Werner v. State*, 44 Ark. 122. But as he was a competent witness when the deposition was taken, it is argued that a subsequent conviction could not render his previous testimony incompetent. All depositions in actions at law are taken *de benne esse*,—that is, subject to the contingency of the witness not being able to attend court at the trial: Mansfield's Digest, secs. 2925, 2921. If it is shown at the trial that the witness is not embraced in one of the excepted classes at that time, the deposition is excluded, and the witness must be called for oral examination. If he is within the contingency provided by the statute, the deposition is taken in lieu of the witness. The *status* at the trial governs

the question of competency: Weeks on Depositions, sec. 515; *Fielden v. Lahens*, 6 Abb. Pr., N. S., 342; *Oliver v. Moore*, 12 Heisk. 482; *Webster v. Mann*, 56 Tex. 119; 42 Am. Rep. 688; for in contemplation of law the deposition is the witness: *Jones v. Scott*, 2 Ala. 58; and the witness is presumed to testify when the deposition is used: *Park v. Lock*, 48 Ark. 133; *Quick v. Brooks*, 29 Iowa, 485; *Fagin v. Cooley*, 17 Ohio St. 51.

If Casat had been living at the time of the trial, his deposition would have been incompetent; because he was infamous, and could not himself testify. The question was directly ruled in *Webster v. Mann*, 56 Tex. 119. See, too, *Le Baron v. Crombie*, 14 Mass. 237.

To hold otherwise would be to make the circumstance of the whereabouts of a witness on the day of trial the test of the admissibility of his testimony. If the witness be present at the trial, his deposition cannot be used, because he may be examined orally in court; but the witness cannot testify then because of his infamy. Depositions are not taken to preserve testimony against the contingency of witnesses being convicted of infamous offenses. The question now presented, if raised in Casat's lifetime after conviction, would have been as to the competency of the witness, and not as to his whereabouts; *Fagin v. Cooley's Adm'r*, *supra*.

Does the fact of his death alter the case? It is a general rule that when a witness has been examined in a cause and dies, evidence of what he swore on the former trial is admissible in a subsequent one. But Casat was *civiliter mortuus* as far as giving evidence in court was concerned, before his execution; and unless his civil death would have rendered the deposition previously taken admissible as evidence by analogy to the proof of what a deceased witness swore at a former trial, it is inadmissible since his death.

The point directly decided in *Le Baron v. Crombie*, *supra*, was, that incompetency arising from conviction of an infamous crime would not avail to let in secondary evidence as in case of death.

Evidence of what an absent witness swore at a former trial is, says Professor Greenleaf, "open to all the objections which might be taken if the witness were personally present": 1 Greenl. Ev., sec. 163. Measured by this rule, the deposition was not admissible in any event while the witness lived. It is difficult to appreciate the argument that death could render the testimony competent. Hanging a convicted felon

affords no reason for admitting his previous incompetent testimony. It is said in *House v. Camp*, 32 Ala. 549, that "the party against whom the testimony of a deceased witness in a former trial, or in a former investigation, is offered, is allowed to make every objection which could be made if the witness were in life, and personally offered for the first time." See, too, *Crary v. Sprague*, 12 Wend. 41; 27 Am. Dec. 110.

It is the tendency of modern legislation to allow objections to witnesses to go to their credit only, leaving the witness competent to testify; but it is the province of the courts to administer the law as they find it. It was error to admit the testimony of Casat, and the judgment must be reversed, and the cause remanded for a new trial.

DISQUALIFICATION AS WITNESS BY FELONY, conviction in another state: *State v. Foley*, 15 Nev. 64; 37 Am. Rep. 458; *Nat. Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Rep. 632.

UNDER STATUTE DISQUALIFYING AS WITNESS ANY PERSON WHO "SHALL upon conviction be adjudged guilty of perjury," a person is not rendered incompetent by a verdict of guilty alone, but sentence must have been pronounced: *Blanford v. People*, 69 N. Y. 107; 25 Am. Rep. 148.

EMBEZZLEMENT OF COUNTY FUNDS BY TAX COLLECTOR is not an infamous crime, although punished as such, and does not exclude the offender as a witness, even while undergoing sentence: *Schuylkill County v. Copley*, 67 Pa. St. 386; 5 Am. Rep. 441.

IMPEACHING WITNESS BY PROVING CONVICTION OF INFAMOUS CRIME: *Allen v. State*, 28 Ga. 395; 73 Am. Dec. 760, and note 775; *Bartholomew v. People*, 104 Ill. 601; 44 Am. Rep. 97. In Kentucky all persons are competent witnesses who are not excluded by section 8, article 8, chapter 29, of General Statutes. Hence one convicted of grand larceny is competent as a witness: *Commonwealth v. McGuire*, 84 Ky. 57.

EFFECT OF PARDON TO RESTORE WITNESS TO COMPETENCY: See *Bennett v. State*, 24 Tex. App. 73; 5 Am. St. Rep. 875, and note 878.

DOWDY v. BLAKE.

[50 ARKANSAS, 205.]

VENDOR OF LAND DOES NOT LOSE OR WAIVE HIS LIEN THEREON BY TAKING NOTES from his vendee for the unpaid purchase-money, and afterwards obtaining thereon a personal judgment at law, where the deed executed by him and accepted by the vendee reserved a specific lien to secure such purchase-money.

SUBROGATION OF CO-PURCHASER OF LAND. — Where two persons purchase land jointly, giving their joint note for the unpaid purchase-money, secured by a lien reserved in the deed, and one of them, to protect his own share, is compelled to pay the whole amount of the note, he will be

subrogated to the vendor's security, and may enforce his right to reimbursement against his co-purchaser, or the latter's vendee, who, after partition, buys with notice of the encumbrance.

APPEAL. The opinion states the case.

J. W. House, for the appellant.

X. J. Pindall and C. W. Frazier, for the appellee.

COCKRILL, J. Blake and Todd purchased a tract of land in Desha County from Treadwell, in 1869, for eleven thousand dollars, Todd paying five thousand dollars of the purchase price at that time. They executed their notes for the deferred payments of purchase-money, and their grantors reserved a lien upon the lands sold to secure the payment. In 1871 Treadwell brought suit in Tennessee against Blake and Todd to recover a balance of two thousand dollars, and interest, which he claimed was due him on the purchase. The defendants resisted the suit, and succeeded in reducing the amount claimed, but judgment was rendered against them for \$1,607.27, with interest, and costs of suit. Execution issued against the defendants upon this judgment, and Blake was compelled to satisfy it. This was in February, 1876. In the mean time, Blake and Todd had a settlement of their affairs, adjusted the burden of the unpaid Treadwell debt equally between them, agreed in writing upon a partition of the lands, and, without executing deeds to carry the partition into effect, each entered into the possession of his separate share. After this, Todd executed a deed of trust upon the lands set apart to him to secure a debt he owed Dowdy, reciting in the deed that the lands were "free from encumbrance, except a small balance for the purchase-money." This was intended by Todd, and understood by Dowdy and the trustee named in the mortgage, to refer to the purchase-money due Treadwell, the payment of which Todd and Blake were then contesting in the Tennessee litigation. Todd made default in the payment of his mortgage debt, and the trustee named in the mortgage advertised the land for sale, in accordance with the power conferred by the deed. His advertisement of sale contained the statement that he would sell the land "subject to a balance of \$865, or thereabouts, of purchase-money." Dowdy became the purchaser at the trustee's sale in March, 1876, to satisfy his debt. This present suit was commenced in December of the same year, by Blake against Dowdy, to subject the lands purchased by the latter

from Todd to the payment of one half of the Treadwell judgment. The court below granted the plaintiff the relief he desired. Dowdy has appealed. His counsel submits that the questions which arise are, Did Treadwell, the original vendor, have a lien on the lands in controversy when Blake discharged the execution against Todd and himself? and if so, can Blake be subrogated to Treadwell's security, and enforce it for any part of the amount so paid against the lands in the hands of Dowdy, Todd's vendee?

The reservation of a specific lien in the deed executed by Treadwell to Todd and Blake to secure the purchase-money thereafter to be paid for the land, and the acceptance of the deed by the grantees, created an equitable mortgage: *Robinson v. Woodson*, 33 Ark. 307; *Ober v. Gallagher*, 93 U. S. 199; 3 Pomeroy's Eq. Jur., secs. 1255 et seq.; and the security was not waived or lost by reason of the fact that the vendor took notes from his vendees for the unpaid purchase-money, and afterwards sued at law and obtained judgment *in personam* against them thereon: *Richardson v. Green*, 46 Ark. 267. Treadwell's security was intact when Blake paid the debt. If Todd had not parted with his interest in the land, would Blake be subrogated to Treadwell's right to resort to it for the repayment of any part of the purchase-money? In Bispham's Principles of Equity, it is said to be the rule that the right of subrogation does not exist "between parties who are equally bound,—as, for example, copartners, co-obligors, and co-contractors": Sec. 337. The same doctrine is stated in terms almost as broad by the annotators of the Leading Cases in Equity: *Dering v. Earl of Winchelsea*, vol. 1, pt. 1, 147; *Aldrich v. Cooper*, vol. 2, pt. 1, 281; and in *Engles v. Engles*, 4 Ark. 286, 38 Am. Dec. 37, the rule, as thus announced, seems to have been followed by this court in a case where one co-purchaser had paid more than his share of the purchase-money, though the attention of the court in that case was not directed to the doctrine of subrogation.

The broad statement of the rule as given above cannot be said to be generally sustained by the adjudicated cases, and much authority qualifying if not denying it, at least as far as co-obligors are concerned, might be quoted. Thus in the case of *Pratt v. Law*, 9 Cranch, 456, 5 Wheat. 429, three persons mortgaged their joint property to indemnify the drawer of bills of exchange drawn for their mutual accommodation; sold the bills, and divided the proceeds equally among them—

selves, each agreeing to pay one third of the amount if the bills should be returned protested; they were so returned, and Greenleaf, one of the three mortgagors, paid the whole debt. The question arose between the assignee in bankruptcy of Greenleaf and one who had acquired title to the interest of the other two mortgagors in the mortgaged property by purchase at sheriff's attachment sale after the bills had been taken up by Greenleaf. It was argued there, as here, that payment by one of the co-obligors discharged the mortgaged (see page 482), but the court held that a two-thirds equitable interest in the mortgage passed to the mortgagor who discharged the debt, and that the assignee succeeded to it, and could enforce it against the land in the possession of the subsequent purchaser. The court say: "Had these bills not been taken up, and the holder prosecuted all the drawers and indorsers to insolvency, there can be no doubt that the holder would have been entitled to charge the mortgaged premises, in equity, with the payment of the bills. But what difference is there, in equity, between the case of any other holder of these bills and that of Greenleaf, who, liable equitably only for one third, was compelled to take up the whole, and did it with his own funds? It consists only in this: that the one becomes creditor for the whole; the other only for two thirds."

It is not difficult to dispose of the question now under consideration when the relation of the parties—that is, of Todd and Blake—is understood. A joint note having been given by them to the vendor for the purchase-money, they were principal debtors in their relation to him, and were jointly and severally bound to him for the whole amount. But the purchase was made for their equal benefit. The land was to be shared equally between them, and the implication of law, in the absence of an agreement to that effect, is, that they intended to adjust the burden of the purchase in like proportion. This is upon the maxim, *Qui sentit commodum sentire debet et onus*. The obligation between themselves was therefore that each should discharge one half the burden, and each become the surety of the other to the extent of the debt which the other was to pay: *McGee v. Russell*, 49 Ark. 104; *Owen v. McGeehee*, 61 Ala. 440; *Ackerman's Appeal*, 106 Pa. St. 1; *Deitzler v. Mishler*, 37 Id. 82; *Crafts v. Mott*, 4 N. Y. 604; *Chipman v. Morrill*, 20 Cal. 130; *Goodall v. Wentworth*, 20 Me. 322; *Fletcher v. Grover*, 11 N. H. 368; 35 Am. Dec. 497; *Stokes v. Hodges*, 11 Rich. Eq. 135; *Sheldon on Subrogation*, sec. 169.

Now, when one in the situation of a surety pays the debt of him who is primarily liable, equity puts him in the place of the creditor whose debt he has discharged, and gives him the benefit of the securities which the creditor has obtained from the principal debtor. Though no assignment of the security is actually made, equity treats it as having been done: *Newton v. Field*, 16 Ark. 232.

"The principle is a general one," says Mr. Bispham, "and will apply in every instance (except in the case of a mere stranger) where one man has paid a debt for which another is liable." It is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is therefore much encouraged and protected": Principles of Equity, secs. 336, 337.

"It is a mode," says Judge Strong in *McCormick v. Irwin*, 35 Pa. St. 111, "which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay," and it is not confined to cases of strict suretyship: *Schoonover v. Allen*, 40 Ark. 136.

From these statements of the general principles of subrogation, it seems clear that one co-purchaser who has paid a part of the common obligation which the other in good conscience ought to have paid, and for which, as between themselves, he is primarily liable, would be substituted to the rights of the creditor in order that injustice might not be done. But we are not without analogous cases to sustain the position.

The equity of subrogation springs out of the right to contribution, and is only one of the means by which that right is enforced: Bispham's Equity, sec. 335. The cases recognizing the right to contribution are therefore in point. The right of contribution between co-purchasers has been frequently recognized and enforced: *Owens v. McGeehee*, and other cases *supra*. As direct authority upon the question, we quote from the opinion in the case of *Ackernan's Appeal*, 106 Pa. St. 1: "In *Gearhart v. Jordan*, 11 Id. 325, it was held that the rule [as to subrogation] embraces purchasers in common of an estate bound by a joint lien; as between themselves, the purpart of each is liable to contribute only its proportion of the common burden, and beyond this is to be regarded simply the surety of the remaining purparts. In this respect they are to be treated as the several estates of joint debtors, one being surety of the other; and if the purpart of one is called upon

to pay more than its due proportion, the tenant or his lien creditors, upon the principle settled in *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629, *Croft v. Moore*, 9 Watts, 451, and *Neff v. Miller*, 8 Pa. St. 347, is entitled to stand in the place of the satisfied creditor to the extent of the excess, which ought to have been paid out of the other shares." The doctrine of *Gearhart v. Jordan*, *supra*, was recognized in the late case of *Watson's Appeal*, 90 Pa. St. 426, where it was said by Mercur, J.: "As between two mortgagors of land held by them as tenants in common, and third persons, each mortgagor is liable for the whole sum secured by the mortgage; but as between themselves, each is liable for one half only; as to the other half, each is surety for the other."

In *Simpson v. Gardiner*, 97 Ill. 237, where two persons purchased land, receiving a deed therefor, not in severalty, but to them in common, gave their joint notes for the unpaid purchase-money, secured by their joint mortgage on the entire tract, and one of them was compelled to pay the whole amount of the notes and interest to save his own share of the land, it was held that the party so paying off the encumbrance was entitled to contribution, and to be subrogated to the rights of the mortgagee, and to enforce the lien of the mortgage as to the money paid above his own proper share. To the same effect are *Williams v. Perry*, 20 Ind. 437, 83 Am. Dec. 327, and *Fisher v. Dillon*, 62 Ill. 379.

For the purposes of subrogation there is no difference between a vendor's lien by reservation in the deed and the mortgage given back by the vendee to secure the purchase-money: 3 Pomeroy's Equity, secs. 1255 et seq. The Illinois and Indiana cases cited are therefore directly in point. The case of a joint mortgage by tenants in common is also analogous, and in such cases it is held that if one of the tenants pays off the whole debt, the lien of the mortgage is preserved as against his defaulting co-tenants to reimburse him: *Sheldon on Subrogation*, secs. 2, 172, 173, and cases cited.

It follows that Blake's equity was perfect as against Todd. Does Dowdy, his vendee, stand in a better position? "Where the right of subrogation exists as against a principal debtor, it may also be enforced against one claiming under him as a purchaser with notice": *White and Tudor's note to Aldrich v. Cooper*, 2 Lead. Cas. Eq., pt. 1, 280.

Dowdy purchased with notice. Aside from being charged with constructive notice of the purchase-money encumbrance

by the reservation of the lien in Treadwell's deed to Todd and Blake, which is a link in his chain of title, and was also of record, before he acquired an interest in the land, the deed of trust under which he acquired his title recites that the land was then subject to the payment of a balance due from his vendor for the purchase-money. He knew of the pendency of the Tennessee suit to recover of Todd and Blake the amount then due on that account. His claim is, that when he purchased at the trustee's sale he supposed the lien had been discharged by the payment made on the Tennessee judgment. It is not probable that Dowdy believed this to be true, for we find the trustee then advertising to sell the land, subject to a lien for the purchase-money, equal in amount to about one half of the Tennessee judgment. As the trustee makes the sale in such cases at the request of the beneficiary, and ordinarily acts under his advice, it is most probable that the statement contained in the notice of sale was made with Dowdy's acquiescence. But the proof does not show that he knew of it, and if we concede that the trustee exceeded his authority in advertising that he would sell the land subject to the specific amount named as a lien, it does not relieve Dowdy. It is charged in the complaint and admitted in the answer that at the time of the partition between the purchasers an adjustment of the burden of the purchase price was made, and that it was then agreed between them that the residue, whatever the result of the suit then pending between them and Treadwell might be, should be borne equally. This occurred before Dowdy's deed of trust was executed. Nothing thereafter transpired to deceive or mislead him. We are not informed that either the judgment record or record of the reserved lien in the deed had been canceled or in any manner satisfied. Both must have warned Dowdy that the lien was still subsisting. If he was informed that one of the parties to the judgment, without knowing which, had paid the amount of the recovery to the judgment creditor, he was not justified in supposing that the lien was extinguished, because he is charged with knowledge that equity would preserve the encumbrance if the payment was made by Blake to protect him from loss by reason of paying Todd's share. Blake's obligation to discharge the encumbrance was not altered by the substitution of Dowdy for Todd.

The case of *Clark v. Warren*, 55 Ga. 575, is relied upon by the appellant to sustain the position that one co-purchaser is

morally and equitably bound to pay off and discharge the mortgage debt for the protection of the vendee of the other co-purchaser. That case seems to belong to the class refusing to extend the doctrine of subrogation to co-obligors. If that is not the meaning of the case, it is authority to the point stated. But we cannot assent to the proposition that one of two co-purchasers who stand upon the same footing has the power to clothe his vendee, who is in the full knowledge of all the facts, with a better garb than invests his own rights, thereby increasing the burden of his co-owner without fault on the part of the latter.

If we regard Todd as Blake's principal, and the land, after the sale to Dowdy, as his surety, the failure to sue Todd before his adjudication as a bankrupt, which occurred at an unknown day in 1876, did not release the land: *Hawkins v. Mims*, 36 Ark. 145; 38 Am. Rep. 30.

It does not appear from the bill, as the appellant assumes, that Dowdy became the purchaser of a part only of the Todd land, or that Todd is still the owner of a part. If there could have been a marshaling of assets, and Dowdy desired it, he should have brought the proper parties before the court, and adopted the ordinary means to effect that result: *Ringo v. Woodruff*, 43 Ark. 469. He made no effort in any form to do so, and the objection now comes too late.

Affirmed.

VENDOR'S LIEN, WAIVER OF: See *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153, and note 156; *Hays v. Horine*, 12 Iowa, 61; 79 Am. Dec. 518; *Andrus v. Coleman*, 82 Ill. 26; 25 Am. Rep. 289; *Kendrick v. Eggleston*, 56 Iowa, 128; 41 Am. Rep. 90; *Willis v. Gay*, 48 Tex. 463; 26 Am. Rep. 328. The lien is not affected by the substitution of other notes in lieu of those first given: *Helm v. Weaver*, 69 Tex. 143. While the assignee of a note secured by a vendor's lien may enforce it against the land, the rule is otherwise if the note was secured by an express lien, and has been permitted to become barred by the statute of limitations: *Stephens v. Mathews's Heirs*, 69 Id. 341.

BURDEN OF PROVING WAIVER OF VENDOR'S LIEN, as between vendor and purchaser, is cast on the latter: *Hays v. Horine*, 12 Iowa, 61; 79 Am. Dec. 518; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718.

SUBROGATION, WHO ENTITLED TO: *Forest Oil Company's Appeals*, 118 Pa. St. 138; 4 Am. St. Rep. 584, and note 588; *Fears v. Alhea*, 69 Tex. 437; 5 Am. St. Rep. 78, and note 85; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783, and note 789. If the vendor transfers the unpaid notes given for the purchase price, and also conveys the land to the same person, the latter becomes subrogated to the rights and remedies of the vendor: *Crafts v. Daugherty*, 69 Tex. 477.

ONE LENDING MONEY TO REMOVE LIEN ON LAND is not thereby subrogated to the rights of the lienor against the land: *Price v. Courtney*, 87 Mo. 387; 56 Am. Rep. 453.

BRANDON v. MOORE.

[50 ARKANSAS, 247.]

LEVY OF ATTACHMENT ON LAND CLAIMED AS HOMESTEAD CREATES LIEN THEREON, under the Arkansas act of 1852, and this lien, unless waived by laches on the part of the judgment creditor, may be enforced by him when the homestead right ceases. Such lien is superior to that of a subsequent mortgage.

EJECTMENT. The opinion states the case.

Tappan and Horner, and McCulloch and McCulloch, for the appellants.

Palmer and Nichols, for the appellee.

COCKRILL, C. J. The appellees, who are plaintiffs in this action of ejectment to recover possession of the land in controversy, derive their title from a purchase at execution sale. The action was against the appellant, who was in possession by virtue of a purchase made at a trustee's sale under a mortgage with power to sell, executed by the judgment debtor after the levy of plaintiffs' execution to secure a debt due to the appellant. The debt upon which the judgment was rendered was contracted when the homestead law of 1852 was in force. The judgment was rendered in October, 1871, and the execution was levied upon the lands in the following January. The judgment debtor, who was the head of a family and a citizen of this state, occupied the lands as his homestead at the time of the levy.

The appellant, who was the defendant below, argues that no lien could be created upon the homestead by the levy of an execution, and that there was therefore no lien on the land when his mortgage was executed. The argument is based chiefly upon the wording of the act as shown by the printed copy in the acts of 1852, page 9, which is, that the homestead shall be "exempt from sale or execution"; and it is argued, with much reason, that the use of the disjunctive "or" between "sale" and "execution" manifests the intention to prohibit the seizure as well as the sale of a homestead under execution. But an examination of the original act on file in the office of the secretary of state—the legal depository of such matters—relieves the question of doubt, for the language employed in the enactment is, that the homestead shall be "exempt from sale on execution." There is therefore nothing peculiar in the wording of the act to aid the appellant's cause.

In the case of *Chambers v. Sallie*, 29 Ark. 412, this court,

following *Norris v. Kidd*, 28 Ark. 485, where the exemption article in the constitution of 1868 was construed, held that the homestead act of 1852 suspended only the sale of the property occupied as a homestead, and left the creditor's rights of judgment and execution lien unaffected, and free to be made available by sale when the right of homestead ceased. It follows, then, that a lien was created upon the lands by the levy of the execution, whether the act of 1852 or the provisions of the constitution of 1868 governed; and the remaining question is, Did it continue in force until the sale at which the appellees purchased? It is the duty of an execution creditor to follow up his levy, and make it effective without unreasonable delay. There is no statute limiting the time within which the lien may be enforced, but laches on his part in executing his levy, it has been frequently held, work a waiver of his lien: *Patterson v. Fowler*, 23 Ark. 459, and cases cited; *Harman v. May*, 40 Id. 146. Here no laches can be imputed to the plaintiffs in execution. The agreed statement of facts shows that before a sale could be had under the execution an injunction issued at the instance of the judgment debtor restraining the sale. The injunction was not finally dissolved until some time in the year 1874. Before a sale could take place thereafter the debtor filed his schedule, in accordance with the act then in force, claiming the land as his homestead. The plaintiff in execution resisted his homestead claim, but the circuit court sustained it, and reserved the land from sale by the statutory *supersedeas*. The lands were occupied as a homestead by the debtor until his death, in 1884, when, without unusual delay, the judgment creditors took the proper steps, as it is agreed, to revive the judgment in accordance with the practice indicated in *State Bank v. Etter*, 15 Ark. 269, and *Barber v. Peay*, 31 Id. 392, to entitle them to the writ of *venditioni exponas* to carry out their levy by sale.

The sale was thus pushed with all the expedition in the power of the judgment creditors. An *alias* execution on a writ of *venditioni exponas* would not have availed them earlier: *Euper v. Alkire*, 37 Ark. 283. The sale to the appellees under the *venditioni exponas* carried the title as against the administrator and heirs of the deceased debtor: *Barber v. Peay*, *supra*. The appellant is in no better attitude: *Hare v. Hall*, 41 Id. 372. He has not the merit of a purchaser without notice, even if that fact would be of any avail.

Affirmed.

SALE OF HOMESTEAD UNDER EXECUTION, WHEN VOID: *McCracken v. Adler*, 98 N. C. 400; 2 Am. St. Rep. 340, and note 342; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267, and note 273.

HOMESTEAD, WHEN SUBJECT TO EXECUTION: *Bishop v. Hubbard*, 23 Cal. 514; 83 Am. Dec. 132.

LAWS EXEMPTING HOMESTEADS FROM EXECUTION for debts "heretofore contracted" are unconstitutional: *Homestead Cases*, 22 Gratt. 266; 12 Am. Rep. 507.

SWANTZ v. PILLOW.

[50 ARKANSAS, 300.]

DELIVERY OF THE PROPERTY, IN REPLEVIN, IS THE PRIMARY OBJECT of the action. The value is to be recovered in lieu of it only in case a delivery of the specific property cannot be had.

ALTERNATIVE JUDGMENT AGAINST DEFENDANT IN REPLEVIN DOES NOT GIVE HIM ELECTION to pay the assessed value of the property, and retain it as his own, against the will of the plaintiff, although he has given a bond for the performance of the judgment, and had the property restored to him by the sheriff.

PURCHASER FROM DEFENDANT IN REPLEVIN OF PROPERTY IN SUIT, with actual notice of the litigation, buys at his peril, and must abide the result of the action the same as the party from whom he got his title. And if judgment be afterwards rendered against the defendant, and an execution thereon issued, it will be the duty of the sheriff under it to take the property from such purchaser, notwithstanding he may have paid full value for it.

REPLEVIN to recover from the defendant a mule taken by him, as sheriff, from the possession of the plaintiff. The cause was tried by the court sitting as a jury, on an agreed statement of facts. L. A. Fitzpatrick brought replevin in the justice's court against O. D. Hudson to recover possession of the mule in question. In that action an order of delivery was placed in the hands of an officer, and Fitzpatrick gave the bond required by law. The officer thereupon took the mule from Hudson, but upon Hudson's executing a bond with sureties, the officer restored to him the mule. The circuit court on appeal adjudged the mule to be the property of Fitzpatrick. The judgment was to the effect that Fitzpatrick recover of Hudson the mule if to be had, if not, seventy-five dollars for its value, and ten dollars for its detention, together with costs. Before the hearing of the appeal, Swantz bought the mule of Hudson for \$125, which was its full market value, but he knew at the time of the purchase that Fitzpatrick's action to recover the mule was pending. On the judgment in favor of Fitzpatrick an execution issued commanding the sheriff to

take from the possession of Hudson the mule in question, and to make out of the estate of Hudson and his surety the sum of ten dollars for its detention; and if the mule could not be found or got, to cause to be made the sum of seventy-five dollars, its value, and the sum of ten dollars for its detention, with interest and costs. The sheriff, in endeavoring to execute the writ, failed to find the mule in the possession of Hudson, but did find it in Swartz's possession. Swartz claimed to be the owner by virtue of his purchase from Hudson, but notwithstanding this claim, the sheriff took the mule, and delivered it to Fitzpatrick. Judgment was rendered for the defendant, and the plaintiff appealed.

James P. Clarke, for the appellant.

J. J. and E. C. Hornor, for the appellee.

COCKRILL, C. J. In replevin, the delivery of the property is the primary object of the action. The value is to be recovered in lieu of it as an alternative only "in case a delivery cannot be had" of the specific property: Mansfield's Digest, sec. 5181. Whatever purpose beneficial to the defendant the judgment in the alternative may serve, it is not put in that form to give one who has been adjudged to be in the wrong his election to pay the assessed value, and retain the property as his own, against the will of the party to whom the judgment of the court has awarded it. The point was so ruled in *Harris v. Harris*, 43 Ark. 535. That was an action of replevin; the judgment was for the plaintiff for the delivery of the property; there was no assessment of its value, and no alternative judgment. The omission to assess the value and render a judgment in the alternative was held not to be prejudicial to any right of the defendant, because the property was under the control of the court, and therefore capable of certain delivery under its order. If the defendant had been entitled, as of right, to have an assessment of the value so that he might pay it and take the property, the judgment would have been reversed. See, too, *Kennedy v. Clayton*, 29 Ark. 279.

The appellant's contention, that the bond required to enable a defendant in replevin to retain the property, stands, for all purposes, in lieu of the property itself, would lead to this, that a party without color of right acquires an absolute title against the true owner, who sues him for the possession of specific articles of personal property, by the execution of a bond to retain the possession. If that result had been contemplated

by the legislature, the provision directing delivery of the property to the plaintiff in case the verdict is in his favor would not have been added: Mansfield's Digest, sec. 2181. Provision for a personal judgment only would have been made in that event. The condition upon which the defendant retains the property is, that he will perform the judgment of the court in the action: *Id.*, sec. 5581. If the plaintiff recovers, the judgment of the court in the first instance is for the delivery of the property: *Id.*, sec. 5181; *Hanf v. Ford*, 37 Ark. 550; *Jetton v. Smead*, 29 *Id.* 383. The delivery is therefore as much a part of the defendant's undertaking as if it were so stipulated in the bond. When the stipulation is required, there is no doubt of the obligation to perform it when the judgment is against the party executing the bond: Freeman on Executions, sec. 468; Wells on Replevin, sec. 476; *Bruner v. Dyball*, 42 Ill. 34; *Lockwood v. Perry*, 9 Met. 446; *Hunt v. Robinson*, 11 Cal. 262; *McKinney v. Purcell*, 28 Kan. 446; *Lovett v. Burkhardt*, 44 Pa. St. 173.

One who purchases property in suit, with actual notice of the litigation, as the plaintiff in this action did, does so at his peril, and must abide the result the same as the party from whom he got his title: Cases *supra*.

It was the duty of the sheriff, therefore, to take the mule in question from the plaintiff, notwithstanding he had paid the defendant in replevin full value for the animal: *Hoffman v. Conner*, 76 N. Y. 121; Freeman on Execution, sec. 475.

The appellee was not guilty of conversion in taking the animal under the writ issued in pursuance of the judgment for the delivery to the plaintiff in replevin, and the judgment is right.

Affirmed.

REPLEVIN IS POSSESSORY ACTION, and does not necessarily determine title: *Pearl v. Garlock*, 61 Mich. 419; 1 Am. St. Rep. 603; and see *Alden v. Carver*, 13 Iowa, 253; 81 Am. Dec. 430; *Maxham v. Day*, 16 Gray, 213; 77 Am. Dec. 409; *Wilson v. Rybolt*, 17 Ind. 391; 79 Am. Dec. 486; *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243.

IN WISCONSIN, DEFENDANT IN REPLEVIN MAY WAIVE RETURN OF PROPERTY and take judgment for its value alone, where the plaintiff has obtained possession of the property, and the jury find the defendant entitled to possession: *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; 82 Am. Dec. 689, and note 696.

ALTERNATIVE JUDGMENT IN REPLEVIN SUIT is rendered for plaintiff only when property is not in plaintiff's possession; and if, during pendency of action of replevin, property has been delivered to plaintiff, alternative judgment is unauthorized: *Phipps v. Taylor*, 15 Or. 484.

London & Dockweiler.

MEHER v. COLE.

[50 ARKANSAS, 361.]

SUBROGATION — RIGHT TO OF PURCHASER AT VOID JUDICIAL OR EXECUTION SALE.—One who, in good faith, under the belief that he is acquiring the title, purchases land at a void judicial or execution sale, and whose bid discharges a lien on the land, is entitled to restitution to the extent of the lien discharged, before the defendant in the void proceeding, or his heirs, can recover the land so purchased by him. But such restitution cannot be awarded to such purchaser without proof that his bid discharged a subsisting lien which could be enforced against the land.

EJECTMENT to recover possession of two tracts of land, formerly owned by the plaintiff's father, F. M. Burk. The defendant, in his answer, claimed title to one of the tracts through a sale under a decree condemning it to be sold for the unpaid purchase-money due from Burk to his vendor, Dickinson; and he claimed title to the other tract by his purchase at an execution sale made under the same decree. He also made his answer a cross-complaint, and prayed to be subrogated to the lien of Dickinson for the payment of the purchase-money. The cause was transferred to the equity docket, and the court held that the decree under which the defendant claimed title was void as to the plaintiffs, but decreed that the lands should be sold to repay the purchase-money paid by the defendant.

E. F. Brown, for the appellants.

W. H. Cate and J. C. Hawthorne, for the appellees.

COCKRILL, C. J. Both the plaintiffs and defendant have appealed in this cause. Each side was asking affirmative relief in the trial court, but if there was the same confusion in the record when the cause was heard as exists in the transcript which is certified here, neither could have complained if the court had refused all relief.

Dates are matters of some importance in the litigation, but, according to the record, almost every event, from the birth of the parties to the entry of the final decree, occurred "on the — day of —, 18—." It is not even certain who are the plaintiffs in the litigation. The action was begun by Nettie Meher, who claimed to be the sole heir at law of F. M. Burk, who died seised and possessed of the land; but in the final disposition of the case, John and James Burk appear in the record as Nettie Meher's co-plaintiffs. How they got into the cause, or what interest they have in the land, is not disclosed.

The defendant Cole admits that the title to the land was in F. M. Burk at the time of his death, but claims that the title of his heirs, as to a part of it, was divested by sale under a decree of the Craighead circuit court condemning the lands to be sold for the unpaid purchase-money due from F. M. Burk, and that the other tract was purchased by him at a sale under an execution, which issued upon the same decree. This decree is exhibited, and is entitled, "G. B. Dickinson, as administrator of Michael Dickinson, deceased, plaintiff, v. James N. Burk, as guardian *ad litem* of minor heirs of F. M. Burk, deceased." It recites that service was had upon the "minor heirs of F. M. Burk," but there is no other designation of the defendants in the decree; no other part of the record in that cause was introduced as evidence in this; and there is nothing to show the identity of the plaintiffs in this action of ejectment with the defendants in the foreclosure suit. We are, perhaps, apprised that Nettie Meher, who is a married woman, is the daughter of F. M. Burk; but whether she was a minor when the decree was rendered, and was a party to the suit and represented by J. N. Burk, who is described as the guardian *ad litem* of minor heirs of F. M. Burk, we cannot tell; nor have we any means of determining whether the other plaintiffs are heirs of F. M. Burk, and of the number who were served with process in that case. The court, on the trial, held the decree void as to these plaintiffs, and refused to give effect to defendant's deeds. We cannot say upon this state of the record that that was error. But the cause was transferred to the equity docket, upon the defendant's prayer to be subrogated to the right of Dickinson's administrator to enforce the payment of the vendor's lien for the purchase-money, which he alleged he and his vendors had discharged by the payment of their bids at the commissioner's and sheriff's sales; and the court, finding that the amount of purchase-money due for the lands was a lien thereon, and that the plaintiff, or those to whose rights he had succeeded by conveyance, had discharged the lien, entered a decree for the defendant condemning the land to be sold to repay the purchase-money paid by him and his vendors.

Though there is some conflict in the adjudged cases on the subject, we entertain no doubt but that one whose bid at a void judicial or execution sale discharges an encumbrance on the land can have restitution to the extent of the lien discharged, before the defendant in the void proceeding, or his

heirs, can recover the lands so purchased by him, if his purchase is made in good faith, under the belief that he is acquiring the title: *Waggener v. Lyles*, 29 Ark. 47; *Brobst v. Brock*, 10 Wall. 519, 533; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; 77 Am. Dec. 557; and cases cited in Freeman's Void Judicial Sales, secs. 51 et seq.

But the difficulty in this case is in determining that the bids at the sale made under the decree discharged a lien, or paid a debt, which could be enforced against the land, or which in any way benefited the heirs of F. M. Burk. If neither of these conditions exists, there is nothing to base an argument for restitution upon. Now, the deed which conveyed the land to F. M. Burk recites the payment in full of the purchase-money. This, like any other receipt, is *prima facie* evidence between the parties of actual payment. When the decree foreclosing the supposed lien for the purchase-money was declared of no effect, the burden was on the plaintiff in the cross-complaint to establish the existence of the lien. There are some hints in the testimony, and it is broadly stated at the bar, that the plaintiff in the foreclosure suit held the promissory note of F. M. Burk, which recited that it was given for the purchase-money of one of the tracts in suit; but the note is not copied in the record, and there is nothing definite to guide us to a conclusion as to its import. Moreover, F. M. Burk had been dead for more than two or five years when the decree of foreclosure was rendered, and there was administration upon his estate, but there is no evidence that the claim was ever presented to the administrator for allowance. If the debt was not preserved, and the decree of foreclosure is void, there was no subsisting lien to be discharged by the purchasers at the sales made in pursuance of the decree (*Stephens v. Shannon*, 43 Ark. 464), and no room for subrogation: See *Waggener v. Lyles*, 29 Id. 55, 56. The purchaser at the sale could not occupy any better position than the plaintiff in the void decree at the time of its rendition. If the plaintiff in that proceeding had no lien when the decree was rendered, the purchaser could acquire none by his purchase.

Too much is left to inference for this court to be able to undertake to adjust the rights of the parties with any hope of approximating the equities of the cause. Both sides are at fault. We cannot enter a decree for either. If the proceeding to foreclose the vendor's lien is void, the title to all the

tracts is in the heirs of F. M. Burk; but we cannot award the lands to the plaintiffs here, because it does not appear that they comprise all the heirs, or that two of them are heirs at all, or have any interest in the land. Each heir can recover only his proportionate share, and we are unable to determine what proportion of the lands these plaintiffs are entitled to: *George v. Elms*, 46 Ark. 266. The decree of foreclosure is not necessarily a nullity. It is binding upon the heirs who were actually served with process: *Boyd v. Roane*, 49 Id. 397; and the defendant has succeeded to their interest in that part of the land which was sold by the commissioner under the decree. Admitting the decree of foreclosure to be void, there is not sufficient evidence before us to sustain the finding that the defendant has removed an encumbrance from the plaintiffs' lands.

It is our practice to dispose of equity causes finally, and end the litigation here, but this record does not afford us the opportunity of doing that in this case.

The decree must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Adjudge the costs of the appeals against the two sides equally.

MAXIM CAVEAT EMPTOR STRICTLY APPLIES TO JUDICIAL SALES, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts, or fraud: *Redd v. Dyer*, 83 Va. 331; 5 Am. St. Rep. 272; *Roberts v. Hughes*, 81 Ill. 130; 25 Am. Rep. 270.

BONA FIDE PURCHASER AT EXECUTION SALE, HOW FAR PROTECTED: *Carden v. Lane*, 48 Ark. 216; 3 Am. St. Rep. 228, and note 230.

RIGHTS OF PURCHASERS AT VOID JUDICIAL SALES TO SUBROGATION: *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557, and note 564.

ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY v. WEAKLY.

[50 ARKANSAS, 397.]

RES GESTÆ, DECLARATION WHEN NOT PART OF. — Where, in an action against a railway company to recover the value of a jack that died while being carried over the defendant's road, the evidence shows that a tramp having a stick in his possession was found in the car with the jack and other animals therein, and the jack was, after the tramp's removal from the car, found dead in the car, with blood running from his mouth and nose, a declaration made in the presence of the conductor of the train, by the tramp soon after his removal from the car, "if it had not been for lopping them mules over the head, I would have froze to death," is not admissible as part of the *res gestæ*.

SHIPPER IS BOUND BY CONTRACT LIMITING CARRIER'S LIABILITY, THOUGH HE DID NOT READ IT nor hear it read before signing it, provided the carrier resorted to no unfair means, and practiced no fraud or imposition in procuring the signature, and the shipper had the opportunity to know its contents.

CONNECTING LINES OF CARRIERS, RIGHTS AND LIABILITIES OF. — A connecting carrier, by receiving freight from another carrier, under a contract between the consignor and the latter, becomes the agent of such other carrier to complete his contract to the extent of shipping it over so much of his route as forms a part of the route over which the shipment was to be made, and is liable for any loss resulting from his failure to perform the contract, but he is also entitled to the benefit of all valid limitations of the carrier's liability contained in the contract.

VALIDITY OF CONTRACT LIMITING CARRIER'S LIABILITY TO SPECIFIED SUM. — A limitation in a contract fairly entered into between a railroad company and a shipper of live-stock over its road, restricting the company's liability in any case to the sum of fifty dollars for each animal lost, is, if based upon a reduction in the charge made for the transportation of the stock, reasonable, and will be enforced as the measure of the company's liability, although the animal lost is shown to have been worth from six hundred to eight hundred dollars.

BURDEN OF PROOF OF NEGLIGENCE WHERE CARRIER'S LIABILITY IS LIMITED BY CONTRACT. — Where live-stock is shipped under a contract limiting the carrier's liability, pursuant to which the shipper takes charge of the stock during the transportation, riding for that purpose on the train with the stock, free of additional charge, the burden of proof is upon the shipper, in an action to recover for the loss of the stock, to show that the loss resulted from the default or negligence of the carrier.

ACTION to recover the value of a jack that died while being carried by the defendant. The opinion states the case.

Dodge and Johnson, for the appellant.

Scott and Jones, for the appellees.

BATTLE, J. This is an action by Weakly and Gooch against the St. Louis, Iron Mountain, and Southern Railway Company, to recover the value of a jack that died while in the course of transportation over defendant's railway.

The facts, as shown by the testimony, were substantially as follows: On the 22d of December, 1884, plaintiff shipped, at Nashville, Tennessee, by the Nashville, Chattanooga, and St. Louis Railway, a car-load of jacks consigned to themselves at Fort Worth, Texas. They were to be shipped by way of Memphis, over the Memphis and Little Rock Railroad to Little Rock, and thence over the defendant's road to Texarkana. A written contract was entered into, whereby the Nashville, Chattanooga, and St. Louis Railway Company agreed to transport the jacks to its freight-station at McKenzie, ready to be delivered to the consignee, or his order, or to such com-

pany or carrier whose line might be considered a part of the route to the destination of the stock; and in consideration of reduced rates of freight it was agreed that if any damage occurred by which the carrier was liable, the amount claimed should not exceed three hundred dollars for each jack injured.

The stock in charge of Gooch, one of the plaintiffs, arrived at Memphis on the morning of the 24th of December, 1884. At Memphis the river was then impassable on account of ice, and Gooch was delayed a day. The agent of the Memphis and Little Rock Railroad told him his stock could go forward on the Kansas City Railway at nine o'clock the next morning; and on the next day, the 25th of December, he took his stock to the Kansas City Railway depot. The stock was driven on the cars a few moments before the train started. About this time a live-stock contract with the Kansas City, Fort Scott, and Gulf, and the Kansas City, Springfield, and Memphis Railroad companies was presented to him for his signature, which he signed without reading, supposing it was a pass for himself. So much of it as is necessary to mention in this opinion is in the words and figures following:—

“MEMPHIS STATION, December 25, 1884.

“Agreement made between the Kansas City, Fort Scott, and Gulf, and Kansas City, Springfield, and Memphis Railroad companies, of the first part, and Weakly and Gooch of the second part, witnesseth: That whereas, the Kansas City, Fort Scott, and Gulf, and Kansas City, Springfield, and Memphis Railroad companies, as common carriers, transport live-stock as per tariff:—

“Now, in consideration that said parties of the first part will transport for the party of the second part one (1) car-load of jacks from Memphis to Fort Worth, Texas, and there deliver to the Kansas City Stock-yard Company, at the rate of seventy-six (76) dollars per car-load, the same being a special rate, lower than the regular rate mentioned in said tariff between said points, said party of the second part hereby relieves said parties of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be that of only a private carrier for hire.

“And the said party of the second part . . . hereby assumes all risk of injury which the animals, or either of them, shall receive in consequence of any of them being wild, unruly, or weak, or by maiming each other or themselves, or in conse-

quence of heat or suffocation, or other ill effects of being crowded in the cars, . . . or of loss or damage from any other cause or thing not resulting from the negligence of the agents of the said parties of the first part.

"And the said party of the second part further agrees that he will load and unload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk while in the stock-yards of the parties of the first part awaiting shipment, and while on the cars or at feeding or transfer points, or where it may be unloaded for any purpose.

"And it is further agreed that the parties of the second part will see that said stock is securely placed in the cars furnished, and that the cars are safely and properly fastened, so as to prevent the escape of said stock therefrom. . . .

"And it is further agreed that in no case shall the said railway companies be liable for a greater amount than fifty dollars per head of live-stock hereby shipped, and that all the above 'rules and regulations for the transportation of live-stock' shall be deemed an essential part of this contract. . . .

"The evidence that said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract is his signature thereto.

"E. A. THRUSTON,

"Witness: L. L. CRISP.

"Agent of the Companies.

"[Pass one.]

"WEAKLY AND GOOCH, Shippers.

"Executed in duplicate."

No charges were demanded or paid by plaintiffs for transporting Gooch and the stock over the railroads, except \$116 at Nashville.

The stock was shipped over the Kansas City, Springfield, and Memphis Railroad to Hoxie, a station on defendant's road 121 miles north of Little Rock. The station-agent at Hoxie testified that the car-load of jacks was received by defendant at Hoxie over the Kansas City, Springfield, and Memphis Railway under the contract of shipment made at Memphis, and was transported to Texarkana under the same contract. Gooch accompanied the stock, riding on the same train with them. The stock arrived at Little Rock in good condition. Shortly after leaving Little Rock the conductor called on Gooch for his contract, and he handed him the Nashville contract, but the conductor refused to accept it, saying it did not pass him free. He then handed the conductor the contract signed at Memphis, which the conductor took, read, and returned, and permitted

him to ride upon it. A short distance north of Prescott, Gooch got out to examine his stock, and found a tramp in the car with them; and after the train had started he told the conductor about seeing the tramp. When the train stopped at the next station the tramp was taken out of the car, and was permitted to go into the caboose to warm, it being cold and sleeting. He had a stick. Over the objection of the defendant, a witness was allowed to testify that when the tramp went into the caboose and sat down by the stove to warm, he said, in the presence of the conductor: "It is d——d cold, and if it had not been for lopping them mules over the head, I would have froze to death."

Gooch got out several times between Little Rock and Texarkana to look at his stock, and found them standing and apparently all right. He did so after seeing the tramp among them, and a short time before they reached Texarkana, and discovered nothing wrong until they arrived at Texarkana, when he found one of the jacks lying dead in the middle of the car, with blood running out of his nose and mouth. He saw no marks of blows or bruises on the animal; its skin was unbroken. He rode on the same train with the stock, according to his contract, from Hoxie to Texarkana, and testified he did not know the cause of the death. He testified that the dead jack was a fine animal, blooded, and of good pedigree, and was worth at Nashville six hundred dollars, and at Fort Worth eight hundred dollars. When the other jacks reached Fort Worth plaintiffs presented the contract signed at Memphis, and on it demanded and received their stock.

Plaintiffs recovered judgment for three hundred dollars, and defendant appealed.

The declaration of the tramp was inadmissible. It was no part of the *res gestæ*, and appellant should not be affected by it.

Appellant asked and the court refused to instruct the jury as follows: "The court instructs the jury that if they find from the evidence that the plaintiff signed the bill of lading or contract of shipment in evidence, by which said car-load of jacks was carried from Memphis, Tennessee, to Fort Worth, Texas, via Hoxie, it matters not if plaintiffs did not read or understand the same, the fact that they signed the same is conclusive, unless said signatures were obtained by fraud on the part of the carriers making the contract; it was plaintiffs' duty to know, and they were bound to know, what the con-

tract contained and meant, and the effect of all its terms and conditions."

But at the instance of appellees did instruct them as follows: "Unless the jury find from the evidence that the Memphis contract, so called in the evidence, was made by the defendant with the plaintiffs for a valuable consideration, they will disregard the same; and if they find that the same was signed by the plaintiffs under the supposition alone that it was only for the purpose of having his jacks shipped from Memphis to a point on defendant's line of railway, where the original or Nashville contract would have carried the same, they may entirely disregard said Memphis contract, unless they believe the injuries received by said jacks were received between Memphis and Little Rock."

Appellant also asked and the court refused to instruct as follows: "If the jury find from the evidence that plaintiffs entered into a written contract at the city of Memphis with the Kansas City, Fort Scott, and Gulf, and the Kansas City, Springfield, and Memphis Railroad companies, by which it was agreed that said railroads should carry their car-load of jacks from Memphis to Fort Worth, Texas, at reduced rates as a private carrier, and upon certain agreed values of said stock upon a limited liability, that the defendant was and is a connecting carrier of said railroads, and that to carry out the contract it was necessary to carry said stock on defendant's railway, that said defendant received and carried said stock under said contract,—then, in that event, the court instructs you that as said bill of lading was a through-bill of lading, expressing upon its face a rate of freight to be charged by all the connecting lines from Memphis, Tennessee, to Fort Worth, Texas, the destination of the stock, then its contract for exemption from liability inures to the benefit of the owners of all the lines of the whole route, including defendant company; and if, therefore, they find that there was such a contract, they must find that the same was for the benefit of this defendant, and must control in this case."

Did the court err in giving the instructions asked for by appellees, and in refusing those asked for by appellant?

At common law, a common carrier, in the absence of a contract limiting his liability, is responsible for any loss or damage, however occasioned, unless it was by an act of God or a public enemy. He is bound to receive and carry all the property offered for transportation, if it be of that character which

he carries for the public, subject to the responsibility incident to his employment, and is liable to an action if he refuses. He cannot relieve himself of such responsibilities, except by contract with the shipper, based upon a consideration. He cannot limit his liabilities by an act of his own; and can only do so by the assent of the parties concerned: *Taylor v. Little Rock etc. R'y Co.*, 39 Ark. 148, 157; *Mich. Cent. R. R. Co. v. Mfg. Co.*, 16 Wall. 318, 328; *Gaines v. Union Trans. & Ins. Co.*, 28 Ohio St. 418; 14 Am. R'y Rep. 158.

Appellees contend that they never assented to the limitation of the liabilities of appellant contained in the contract signed at Memphis, because they signed it without reading or hearing it read, and under a mistake as to its contents. But this will not relieve them from the contract, unless it was procured by fraud or imposition. It has generally been held by the courts in this country and in England that such contracts are binding on the shipper, although he did not read or hear them read before signing, provided the carrier resorted to no unfair means, and practiced no fraud or imposition, and the shipper had the opportunity to know the contents. As said by Hutchinson on Carriers: "There is nothing unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind and plead ignorance, when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his services and risk": Hutchinson on Carriers, sec. 240; *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Long v. New York Cent. R. R. Co.*, 50 N. Y. 76; *McIlroy v. Buckner*, 35 Ark. 555; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Rice v. Dwight Mfg. Co.*, 2 Cush. 80, 87; *Harris v. Story*, 2 E. D. Smith, 363, 367; *Lewis v. Great Western R'y Co.*, 5 Hurl. & N. 867; Cooley on Torts, 488-491; *Greenfield's Estate*, 14 Pa. St. 489, 504; *Hunter v. Walters*, L. R. 7 Ch. App. 75, 82, 84; *Morrison v. Phillips*

and Colby Con. Co., 44 Wis. 405, 409; 28 Am. Rep. 599; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599, 603; *Long v. New York Cent. R'y Co.*, 3 Am. R'y Rep. 350; *Mulligan v. Illinois Cent. R'y Co.*, 36 Iowa, 181; 14 Am. Rep. 514; *Grace v. Adams*, 1 Am. Rep. 131; 100 Mass. 505.

But in this case the Kansas City, Fort Scott, and Gulf, and the Kansas City, Springfield, and Memphis, and the St. Louis, Iron Mountain, and Southern Railway companies were not parties to the contract made at Nashville. The stock was to have been transported by way of Memphis, over the Memphis and Little Rock Railroad to Little Rock, and from there to Texarkana. When it arrived at Memphis, it was ascertained it could not be shipped over the Memphis and Little Rock road without delay, and appellees determined to ship it over another and much longer route; and for that purpose, entered into the contract signed at Memphis. Under this contract, the stock and one of the appellees were carried from Hoxie to Texarkana, and the stock was delivered to its owners at Fort Worth. Appellant acted under and was governed by it in carrying the stock. If the contract signed at Memphis was procured by fraud, and appellees were unwilling to be governed by it, they should have so informed appellant before the delivery of the stock to its agents. They were then in a situation to correct any mistake or misunderstanding in the terms of the shipment, and definitely adjust its terms. But having failed in this, they cannot make appellant suffer the consequences of their negligence. If a fraud was committed in the procurement of the contract at Memphis, their negligence enabled the perpetrators to succeed in its commission, and they should bear the loss occasioned by it, if any.

The Kansas City, Fort Scott, and Gulf, and the Kansas City, Springfield, and Memphis Railroad companies contracted with appellees to transport their stock from Memphis, Tennessee, to Fort Worth, Texas. The appellant, by receiving the stock, became their agent to complete their contract to the extent of shipping the stock over so much of its road as formed a part of the route over which the shipment was to be made. From this fact, the law implied a privity between the parties to this action sufficient to enable appellees to sue appellant for any losses sustained by reason of its failure to perform the contract, and gave to appellant the benefit of all valid limitations contained in the agreement upon the carrier's liability. So that while the burdens were imposed, the benefits of the

limitations in the contract inured to appellant: *Taylor v. Little Rock etc. R. R. Co.*, 39 Ark. 148, 158; *Halliday v. St. Louis etc. R'y Co.*, 74 Mo. 159; 41 Am. Rep. 309; 6 Am. & Eng. R. R. Cas. 433; Hutchinson on Carriers, secs. 251, 252, 254, 256.

Appellant contends that the court below erred, because it asked and the court refused to give an instruction in the following words: "If the jury find from the evidence that the plaintiffs entered into a contract with defendant or its connecting carrier whereby it was agreed that in no case should the carriers be liable for a greater amount than fifty dollars for each stock or animal shipped therein, then they are instructed that if they find that the defendant is liable at all in this action, their verdict cannot exceed the sum of fifty dollars."

In the Memphis contract the liability of the carrier for losses or damages was limited to fifty dollars for each jack injured. Should the instruction limiting the liability of appellant to fifty dollars have been given?

In *Railroad Co. v. Lockwood*, 17 Wall. 357, it was held: "A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law."

Hart v. Pennsylvania R. R. Co., 112 U. S. 331, was an action like this. In that case the property received for shipment was five horses, and the extent of the carrier's liability agreed upon for each horse was two hundred dollars. By the negligence of the carrier one of the horses was killed, and the others were injured. The plaintiff proved the horses were race-horses, and offered to show damages based on their value amounting to over twenty-five thousand dollars. The testimony was excluded, and he had a verdict for twelve hundred dollars. On writ of error brought by him, it was held that the evidence was not admissible; that the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; and that the terms of the limitation covered a loss through negligence. Mr. Justice Blatchford, speaking for the court, said: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the

shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and when there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The *South and North Alabama R. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578, was an action against a carrier on a contract to carry live-stock, in which the extent of the carrier's liability was limited to fifty dollars to each animal. The court said: "We have had much difficulty in determining the validity of the stipulation in the contract, that if loss or injury should occur, for which the company is liable, the amount claimed should not exceed fifty dollars for any one of the animals. If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal and the amount of freight received, we should not hesitate to declare it unjust and unreasonable. But as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier against exaggerated or fanciful valuations. We cannot therefore presume it unjust and unreasonable, and it is the measure of appellant's liability."

There are other decisions to the same effect as those cited: See *South and North Alabama R'y Co. v. Henlein*, 56 Ala. 368; *Harvey v. Terre Haute etc. R. R. Co.*, 74 Mo. 538; *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442. But all the decisions upon this question are not in harmony. They are cited and reviewed to some extent in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331. After a review of them, the court reached the result as above stated.

In *St. Louis etc. R'y Co. v. Lesser*, 46 Ark. 236, this court followed the decisions of the supreme court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, and *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331. In that case the carrier transported a car-load of mules over its road under a contract which limited its liability to one hundred dollars for each horse or mule. One of the horses, of the value of \$150, was injured. This court held that the damages the shipper was entitled to recover in that case was the proportion of one hundred dollars the horse was lessened in value by reason of the injury.

As a general rule, the common carrier is bound to receive and carry that which is offered to him for transportation. He ought to be entitled to a reasonable reward for his services. As the risk of conveying property of considerable value is greater than that of small value, the care required is, and the reward should be, greater. It is, therefore, reasonable and right that the value of the property shipped should be ascertained in order that the carrier may know the extent of his responsibility and the care and attention required, and fix the amount of his reward. As said by Lord Mansfield in *Gibbon v. Paynton*, 4 Burr. 2298: "His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionate to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other method of security; and therefore he ought, in reason and justice, to have a greater reward." If, therefore, the measure of the liability of the carrier as agreed upon is adjusted by the reward to be received by the carrier under his contract, and the contract of shipment is fairly entered into, and no deceit is practiced upon the shipper, the contract is reasonable as to the measure of liability, and should be upheld.

Inasmuch as the measure of appellant's liability in the stipulations contained in the Memphis contract is stated to

be based on reduced rates of freight paid for the transportation of the stock, it must be presumed, in the absence of evidence to the contrary, that the rate of freight was graduated by the valuation agreed upon as the limit of the carrier's liability, and was reduced under the regular rates in consequence and consideration of the terms or stipulations of the contract: *St. Louis etc. R'y Co. v. Lesser*, 46 Ark. 236.

As to the burden of proof, the circuit court instructed the jury, at the instance of appellees, as follows: "The jury are instructed, as a matter of law, that whenever a common carrier seeks to avoid a liability for losses on account of the contract limiting its liability, the burden of proof, as a general rule, is upon it, not only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract; and this fact must be established with reasonable certainty, and not rest upon conjecture or possibility. So, in this case, if defendant seeks to avoid its liability for the death of the jack sued for under a clause of their contract of shipment exempting the company from such liability for injury to said jack, caused by the animals shipped in the car with him, or on the ground that the death of said jack was caused by the inherent vices and propensities of such animals, the burden of proof is upon the defendant to show that the death of said jack was caused by other animals in the car, or their inherent viciousness."

And at the instance of the appellant as follows: "If the jury find from the evidence that plaintiffs' stock was received and transported under a written contract or bill of lading, wherein it was stipulated or agreed that the owners or their agents should ride upon the freight trains in which said stock was being transported, and that they should load, transport, feed, and care for said stock while on the cars, or at feeding, transfer, or other points; and if they further find that plaintiff J. S. Gooch, one of the owners of said stock, did accompany the said stock, and was upon the same train upon which the stock was at the time said animal died, and that said contract exempted the carriers from all liability from injury to said stock, then you are instructed that by virtue of said exemption in said contract contained, the burden of proof is upon plaintiffs to show that said animal was killed by or through the negligence or fault of this defendant; and if you find that no evidence of negligence has been offered showing, or tending to show, that defendant was at fault, then you must find for the defendant."

These instructions are inconsistent with each other; and the one given at the instance of the appellees is misleading and not applicable to the facts in this case.

In *St. Louis etc. R'y Co. v. Lesser*, 46 Ark. 236, it is said: "Whenever a common carrier seeks to avoid a liability for losses on account of a contract limiting his liability, the burden of proof, as a general rule, is upon him, not only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract." But this court has never applied this rule to any case except those in which the loss was caused by fire or like causes, against which the carrier was an insurer at common law. It did not, in *St. Louis etc. R'y Co. v. Lesser*, *supra*, undertake to say to what class of cases it is applicable. Does it govern in this case?

At common law a carrier is held to the strictest accountability. The reason is, when goods are placed in his care for transportation, the shipper is dependent on him for their safe-keeping and delivery. He seldom goes or sends any one to protect his interest. His necessities often compel him to rely solely on the carrier. If the goods are lost through the grossest negligence of the carrier or his servants, or stolen by them, or others in collusion with them, he is unable to prove it by any one except the carrier's servants. If he is compelled to prove that his goods were lost through the fault of the carrier before he can recover, his ability to sustain an action would be necessarily uncertain and sometimes impossible. To protect him, and to insure the utmost good faith and diligence in the carriage and delivery of freight, the common law imposes upon the carrier the responsibility of an insurer against all losses except those occasioned by the act of God or the public enemy; and in case of damage or loss, requires him to show the cause. To exonerate himself from liability, the burden of proof is upon him to show that the loss or damage was caused by the act of God or the public enemy. This rule of evidence is the necessary result of the common-law liability, and the circumstance that the cause of the loss is presumed to be peculiarly within the knowledge of the common carrier.

But in this case there was a restriction upon the common-law liability of the carrier. Appellees agreed to load the cars with the stock, and unload, feed, water, and attend to them at their own expense and risk while in the stock-yards of the carriers awaiting shipment, and on the cars, or at feeding or transfer points, or when the same might be taken off the cars for any

purpose, and to see that the cars were securely fastened; and for that purpose one of them was allowed to ride and did ride on the train with the stock from Hoxie to Texarkana, free of additional charge. Under the contract, they took charge of the stock during transportation, and relieved appellant of any responsibility for the discharge of those duties of a common carrier which they undertook to perform, and confined its duties, by the Memphis contract, to the furnishing suitable cars and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier, which make it his duty to account for the loss of freight, did not devolve on appellant. Being in charge, they were presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause, before they can be entitled to recover: *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645, 651; 15 Am. Rep. 740; *Clark v. St. Louis etc. R'y Co.*, 64 Mo. 441, 448; *Harvey v. Rose*, 26 Ark. 3; 7 Am. Rep. 595; *Kansas Pacific R'y Co. v. Reynolds*, 8 Kan. 623, 641.

For the errors indicated, the judgment of the court below is reversed, and the cause is remanded for a new trial.

ADMISSIBILITY OF DECLARATIONS AS PART OF RES GESTÆ: *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 894, and note 896; *Durkee v. Central Pac. R. R. Co.*, 69 Cal. 533; 58 Am. Rep. 562, and note 565-568.

COMMON CARRIER OF LIVE-STOCK, duties and liabilities of: *Ayres v. Chicago etc. R. R. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226, and note 233; power to limit liability by contract: *Gulf etc. R. R. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494, and note 500.

IN ABSENCE OF FRAUD OR MISTAKE, CONTRACT FOR CARRIAGE OF ANIMALS signed by the shipper is the sole evidence of the agreement, although it differs from a previous oral contract, and the shipper did not read it: *St. Louis etc. R. R. Co. v. Cleary*, 77 Mo. 634; 46 Am. Rep. 13; *McFadden v. Mo. Pac. R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721.

SHIPPER BOUND BY CONTRACT OF SHIPMENT executed by himself, and cannot excuse himself because he did not read same, or know contents, when no mistake, fraud, imposition, or deceit is charged: *McFadden v. Missouri Pacific R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; *Harris v. Grand Trunk R'y Co.*, 15 R. I. 371.

COMMON CARRIER, RIGHTS AND LIABILITIES OF CONNECTING LINES: *Falvey v. Georgia R. R. Co.*, 76 Ga. 597; 2 Am. St. Rep. 58; *Knott v. Raleigh etc. R. R. Co.*, 98 N. C. 73; 2 Am. St. Rep. 321, and cases collected in note 325.

COMMON CARRIERS—CONNECTING LINES OF COMMON CARRIERS ARE JOINTLY LIABLE when contract for shipment is made with one and damages are suffered on the line of the other: *Falvey v. Georgia R. R. Co.*, 76 Ga. 597;

2 Am. St. Rep. 58; even though contract with first carrier was to carry over its own line, and another line different from one over which actually carried: *Independence M. Co. v. Burlington etc. R. R. Co.*, 72 Iowa, 535; 2 Am. St. Rep. 258. But connecting line is liable only as forwarding agent, and not for damage done beyond its terminus, except by special contract, or when connecting lines are associated under agreement to become liable for contracts of each: *Knott v. Raleigh etc. R. R. Co.*, 98 N. C. 73; 2 Am. St. Rep. 321. But in Rhode Island and Minnesota, in absence of special contract, first carrier not liable for faults of subsequent carriers: *Harris v. Grand Trunk R'y Co.*, 15 R. I. 371; *Ortt v. Minneapolis etc. R'y Co.*, 36 Minn. 396.

COMMON CARRIER CANNOT BY CONTRACT limit its liability from consequences of its own negligence: *Ortt v. Minneapolis etc. R'y Co.*, 36 Minn. 396; but in Missouri it can by contract limit its common-law liability: *McFadden v. Missouri Pac. R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721. In Texas common carrier cannot by contract limit its liability against loss of live-stock, except such loss as occasioned by act of God, public enemy, act of owner, or vicious propensity of animal: *Gulf etc. R. R. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494.

WHERE COMMON CARRIER'S LIABILITY IS LIMITED BY CONTRACT, BURDEN OF PROOF IS ON CARRIER to show that loss *in transitu* was within the exception limiting general liability: *Lindsley v. Chicago etc. R'y Co.*, 36 Minn. 539; 1 Am. St. Rep. 692. But in New York where carrier by contract exempts himself from liability for loss by fire, unless the same be proved to have occurred from the fraud or gross negligence of the carrier or its servants, the burden of proof is upon the party seeking to recover to show that the fire resulted from one of the causes specified: *Platt v. Richmond etc. R. R. Co.*, 108 N. Y. 358.

RITCHIE v. JOHNSON.

[50 ARKANSAS, 551.]

ONE WHO ENTERS ON LAND PENDING AN ACTION OF EJECTMENT to recover the possession thereof is presumed to hold under the defendant therein, and if he holds by an independent title, it is incumbent upon him to show that fact.

PLAINTIFF IN EJECTMENT WHO HAS RECOVERED JUDGMENT IS ENTITLED TO WRIT of possession against a person who entered under the defendant after the commencement of the action, and such person cannot resist his application for the writ on the ground that he holds under an independent title acquired after his entry.

PETITION for *alias* writ of possession. The opinion states the case.

John B. Jones, for the petitioner.

U. M. and G. B. Rose, and L. A. Byrne, contra.

VALENTINE, Special Judge. On the 24th of October, 1878, James Ritchie brought suit by ejectment in the Miller circuit court against Bero Buliner and Sarah L. Buliner, his wife,

for the recovery of lot number (5) five, in block number (73) seventy-three, in the town of Texarkana, Arkansas.

Pending the subsequent litigation, Ritchie died, having previously conveyed the property to his wife, Lucy Ritchie.

The case was afterwards transferred to the equity docket, and at the July term, 1885, a decree was rendered in favor of the defendant Sarah L. Buliner, as the owner and party in possession of the property.

On appeal to this court, and at the May term, 1887, the decree was reversed, and a judgment entered in favor of Lucy Ritchie for the recovery of the premises in controversy: *McLain v. Buliner*, 49 Ark. 218; 4 Am. St. Rep. 36.

Upon this judgment, a writ of possession was issued, directed to the sheriff of Miller County, commanding him to take the possession from the defendants Bero and Sarah L. Buliner, and deliver the same to the plaintiff, Lucy Ritchie.

The sheriff returned this writ unserved, alleging as his reason therefor that he did not find the defendants in possession, but found the premises in possession of H. S. Johnson and Jane R. Johnson, his wife, who claimed title under a deed from the defendant Sarah L. Buliner to Jane R. Johnson, dated October 13, 1885, and also under bond for title from J. F. and J. C. Kirby, dated November 29, 1887, the Kirbys claiming title under a patent from the state of Arkansas.

Thereupon Lucy Ritchie filed her petition in this court, reciting her recovery here, the issue of the writ of possession, and refusal of the sheriff to execute it, and praying that an *alias* writ be issued, commanding him to take the possession of the premises from H. S. and Jane R. Johnson, and deliver them to petitioner.

Mrs. Johnson filed a response, alleging that she was not a party to the suit, or in any way bound by its determination, and claiming that she holds the possession under a conveyance made by the state of Arkansas to J. F. and J. C. Kirby on the 25th of September, 1883, and under a bond for title from them to her on the 29th of November, 1887. Copies of these deeds are filed as exhibits.

To this response Mrs. Ritchie filed an answer, denying that Mrs. Johnson claimed title under the Kirby deed, and alleging that, until the determination of this suit in June, 1887, her only claim of title was under a deed from the defendant Sarah L. Buliner, executed October 13, 1885, and during the pendency of this suit. This deed is exhibited with the answer.

These are all the material facts in the case as presented by the pleading and exhibits.

There is no evidence as to the time when Mrs. Johnson actually went into possession. The only positive statement with regard to possession at all is in Mrs. Johnson's answer, filed January 30, 1888, in which she says she holds possession under the Kirby deed. Several weeks before this, the sheriff, when proceeding to execute his writ, had found her in possession.

The law presumes that she was holding under the defendant, and if this was not the case, and she really held by an independent title, it is incumbent upon her to show it: *Sampson v. Ohleyer*, 22 Cal. 200; *Leese v. Clark*, 29 Id. 664; *Wetherbee v. Dunn*, 36 Id. 147; 95 Am. Dec. 166; *Freeman on Executions*, sec. 475.

The mere statement made several weeks afterwards in an unsworn pleading, that she was then holding by such title, would scarcely be sufficient to rebut the legal presumption. This, together with the fact that she had obtained a deed from the defendant Mrs. Buliner, since the commencement of the suit, forces us to the conclusion that she acquired the possession under her.

It is settled beyond controversy, that in an action of ejectment, a party who goes into possession under the defendant is liable to be turned out by the writ: *Hanson v. Armstrong*, 22 Ill. 442; *Wallen v. Huff*, 3 Sneed, 82; *Howard v. Kennedy*, 4 Ala. 592; 39 Am. Dec. 307; *Freeman on Judgments*, sec. 171, and cases cited; *Freeman on Executions*, sec. 475, and cases cited.

It is equally well settled that a party holding by independent and paramount title will not be turned out: *Long v. Morton*, 2 A. K. Marsh. 39; *Clark v. Parkinson*, 10 Allen, 133; 87 Am. Dec. 628; *Ford v. Doyle*, 37 Cal. 346; *Garrison v. Savignac*, 25 Mo. 47; 69 Am. Dec. 448; *Powell v. Lawson*, 49 Ga. 290.

This case presents both phases. Mrs. Johnson went in under Mrs. Buliner, the defendant, and now holds under an outside and independent title which has never been adjudicated.

Can she do this? In other words, conceding the Kirby title to be good, can she tack her possession acquired from the defendant under a bad title to the subsequently acquired good title, and thus bid defiance to the writ? This is an entirely new question in this court.

Freeman on Judgments, section 171, says: "The action of

ejectment being purely a possessory action, a number of persons are considered as in privity therein to the extent that they must yield up the possession to the prevailing plaintiff, though their title to the property remains unadjudicated, and is capable of being successfully asserted against the now successful party in some subsequent controversy. When considering the force of a judgment in ejectment, privies 'are those who entered under, or acquired an interest in the premises from or through, or entered without title by collusion with, defendants subsequent to the commencement of the action.' "

This and the authorities cited in support of it fully sustain the position that Mrs. Johnson entered in privity with Mrs. Buliner, and stands in her shoes.

If the statement by Mr. Freeman that "the action of ejectment is purely a possessory action" be correct, this ends the controversy; for it would be absurd to say that an action exclusively for one purpose could be thwarted by circumstances entirely extraneous and independent.

But it is not necessary to concede, without qualification, that the action of ejectment is "purely possessory." It is sufficient to say that, as modified by our statute, and though based upon title, it is still essentially a possessory action: *Hill v. Plunkett*, 41 Ark. 465.

Mrs. Johnson's grantor, Mrs. Buliner, might, had she chosen to do so, have set up the Kirby title as a defense to Mrs. Ritchie's suit, and if successful, Mrs. Johnson would have reaped the benefit. She failed to do this, and her grantee ought not now to be heard to complain if the burden is thrown upon her, and not upon the successful plaintiff: *Montgomery v. Whiting*, 40 Cal. 294.

In *Kercheval v. Ambler*, 4 Dana, 166, Forman and Ambler, at the same term of court, recovered separate judgments in ejectment for the same land against Kercheval. Forman entered under a writ of possession, and at once leased to Kercheval. Afterwards, under a writ issued under the Ambler judgment, the question arose whether Kercheval could be dispossessed. The court, while conceding that Kercheval held under Forman, and that Forman himself, if in actual occupancy, could not be dispossessed, held that Kercheval could not set up his actual possession acquired from a stranger against a writ under a judgment to which he was himself a party.

This is a stronger case than the case now before the court,

because Mrs. Johnson can, with regard to the possession, occupy no better position than her grantor, Mrs. Buliner, while Kercheval did actually occupy the better position of his lessor, Forman, who could himself have successfully resisted the writ.

As we decide the case adversely to Mrs. Johnson, it becomes unnecessary to discuss the apparent validity or invalidity of her deed from the Kirbys, and on this we decline to express an opinion.

A writ of possession is awarded as prayed for.

ALL WHO COME INTO POSSESSION OF LAND AFTER ACTION BROUGHT must *prima facie* go out under writ of possession, if the plaintiff recovers; for the presumption is that they came in under the defendant: *Wetherbee v. Dunn*, 36 Cal. 147; 95 Am. Dec. 166, and note 170; *Oetgen v. Ross*, 47 Ill. 142; 95 Am. Dec. 468.

WHERE, PENDING ACTION TO RECOVER LAND AGAINST ONE IN POSSESSION UNDER CLAIM OF TITLE, he lets it to a tenant, who, with notice of the action, enters and sows crops, and judgment is recovered against the lessor, and he surrenders possession, the tenant is not entitled to the crops: *Rowell v. Klein*, 44 Ind. 290; 15 Am. Rep. 235.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

SEARS v. STARBIRD.

[75 CALIFORNIA, 91.]

**SUPREME COURT WILL TREAT AS CONTEMPT USE OF LANGUAGE IN BRIEF
FILED THEREIN** which impugns the motives of, and is disrespectful to,
the lower court.

ACTION by plaintiffs to recover from defendant his proportionate part of a sum of money paid by plaintiffs, which had been owing by a partnership formerly existing between the plaintiffs and defendant.

F. D. and G. W. Nicol, for the appellant.

F. W. Street, for the respondents.

HAYNE, C. The brief of the counsel for appellant contains the following: "The court, out of the fullness of his love for a cause, the parties to it or their counsel, or from an overzealous desire to adjudicate 'all matters, points, arguments, and things,' could not, with any degree of propriety under the law, patch and doctor up the case of the plaintiffs, which, perhaps, the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever."

Here is a distinct intimation that the judge of the court below did not act from proper motives, but from a love of the parties or their counsel. We see nothing in the record which suggests that such was the case. On the contrary, the action complained of seems to us to have been entirely proper: See *Sill v. Reese*, 47 Cal. 340. The brief, therefore, contains a

groundless charge against the purity of motive of the judge of the court below. This we regard as a grave breach of professional propriety. Every person on his admission to the bar takes an oath to "faithfully discharge the duties of an attorney and counselor": Code Civ. Proc., sec. 278. And among such duties, as defined by statute, is "to maintain the respect due to the courts of justice and judicial officers": Id., sec. 282. Surely such a course as was taken in this case is not a compliance with that duty. In *Friedlander v. Sumner G. & S. M. Co.*, 61 Cal. 117, the court said: "If unfortunately counsel in any case shall ever so far forget himself as willfully to employ language manifestly disrespectful to the judge of the superior court, — a thing not to be anticipated, — we shall deem it our duty to treat such conduct as a contempt of this court, and to proceed accordingly"; and the briefs in the case were ordered to be stricken from the files.

We therefore advise that the submission of this case be set aside, and that the brief of counsel for the appellant be stricken from the files, and that if a proper brief on behalf of appellant be not filed within thirty days from the entry of the order, the appeal stands dismissed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, ordered the submission of the cause is set aside, and brief of counsel for appellant stricken from the files of this court; and if within thirty days from the filing of this order a proper brief on the part of appellant be not filed herein, the appeal will be dismissed.

CONTEMPT, WHAT CONSTITUTES: *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *In re Lowenthal*, 74 Cal. 109; 5 Am. St. Rep. 424; *Walling v. Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400; *Williamson's Case*, 26 Pa. St. 9; 67 Am. Dec. 374; *In re Sturoc*, 48 N. H. 428; 97 Am. Dec. 626; *State v. Gallo-way*, 5 Cold. 326; 98 Am. Dec. 404, note 416-420; libel on judges: *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257; abusing judge in street for his judicial action: *People v. Green*, 7 Col. 237; 49 Am. Rep. 351; libel on grand jury: *Storey v. People*, 79 Ill. 45; 22 Am. Rep. 158; *In re Cheeseman*, 49 N. J. L. 137; 60 Am. Rep. 596; report that a juror can be bribed: *Little v. State*, 90 Ind. 338; 46 Am. Rep. 224; addressing insolent letters to judge: *In re Pryor*, 18 Kan. 72; 26 Am. Rep. 747.

MONTGOMERY v. KEPPEL.

[75 CALIFORNIA, 128.]

MORTGAGEE IS CHARGED WITH NOTICE OF FACT AFFECTING TITLE TO MORTGAGED PROPERTY, when he has readily accessible means of acquiring knowledge thereof which he might have ascertained by inquiry.

PRIOR MORTGAGEE IS CHARGED WITH NOTICE OF TERMS UPON WHICH PURCHASE OF MORTGAGED PROPERTY IS MADE, where, pending his negotiation with the mortgagor, he acquires knowledge that the title to the property is in a third person, with whom the mortgagor was negotiating for the purchase, which was afterwards consummated by the delivery of a deed to the mortgagor, and the execution by him of a mortgage back to the grantor to secure the purchase-money.

STATEMENT, TO OPERATE AS ESTOPPEL, MUST BE MADE WITH EXPRESS INTENTION TO DECEIVE, or with such carelessness or culpable negligence as to amount to constructive fraud.

ACTION to foreclose a mortgage. The facts are stated in the opinion.

Hundley and Gale, for the appellant.

W. F. Goad and Arthur Rodgers, for the respondent.

THORNTON, J. The plaintiff brought this action to foreclose a mortgage against the mortgagor, Garret Keppel, and the Spring Valley Mining and Irrigating Company. Other persons were made parties, which need not be here especially mentioned. As to all these defendants except Keppel, the general allegation is made that they have, or claim to have, some interest in or claim upon said lands, or some part thereof, as purchasers, mortgagees, judgment creditors, or otherwise, which interests or claims are subsequent to and subject to the lien of plaintiff's mortgage. The defendant corporation above named set up a mortgage upon a portion of the land covered by the plaintiff's mortgage executed by Keppel to it; and which of these mortgages was prior in right, as appears from the transcript, was the principal question tried and determined by the court. It appears from the findings of fact that the mortgage to the corporation defendant was executed on the twenty-second day of November, 1883, acknowledged by the mortgagor on the same day, and filed for record in the office of the county recorder of Butte County (where the mortgaged property was situate) at 10:25 o'clock, on the twenty-sixth day of November, 1883. It further appears that the land mortgaged to the corporation was conveyed by it to the common mortgagor on the same day on which the mortgagor executed to the defendant above named the mortgage just mentioned;

that the mortgage was executed to secure to the defendant a part of the purchase-money of the said land, the other portion having been paid by Keppel, the purchaser, in cash prior to the delivery of the conveyance to him by the defendant; that on the 24th of November, 1883, the deed of conveyance of the land sold to Keppel was delivered to him by defendant, and was recorded in the proper office in Butte County, on the twenty-sixth day of November, 1883. The mortgage to plaintiff was executed on the 22d of November, 1883, and was recorded in the proper office in Butte County on the twenty-second day of November, 1883. This last mortgage was executed to secure a loan of a large sum of money made by plaintiff to Keppel. While Keppel was negotiating with plaintiff for this loan, it became known to plaintiff that the title of a portion of the land which he (Keppel) offered as security was in the corporation defendant, for the purchase of which Keppel was then negotiating with the corporation. This purchase was consummated by the delivery of the deed above mentioned, executed to Keppel by the corporation, a payment of a portion of the purchase-money by Keppel, and, concurrently with the execution of the deed, the execution to the corporation by Keppel of the mortgage above mentioned to secure the payment of the remainder of the purchase-money. All the above constituted parts of the transaction of purchase by Keppel of the corporation of the land above referred to. Of this negotiation of Keppel to purchase, the plaintiff, at the time of making the loan to him, was aware; and he must be held to have known that the mortgage conveyed to him no interest in this land until the delivering of the deed by the corporation to Keppel. Being aware of the purchase by Keppel of this land of the defendant, plaintiff must be held to have known of the terms of the purchase, and all of them; and if he did not know them, he must have deliberately abstained from knowing. The evidence shows that the plaintiff was in communication with Keppel all the time that the purchase was pending, knew all the terms of it, and it would be most strange if they were not communicated to plaintiff by Keppel. Having readily accessible means of acquiring knowledge of a fact, which he might have ascertained by inquiry, is equivalent to notice and knowledge of it. This is well settled by repeated decisions of this court: *Fair v. Stevenot*, 29 Cal. 486; *Smith v. Yule*, 31 Id. 184; 89 Am. Dec. 167; *Pell v. McElroy*, 36 Cal. 272; *Thompson v. Pioche*, 44 Id.

516. Under these circumstances, we must hold that plaintiff knew that a part of the purchase-money was not paid when the deed was executed to Keppel by the corporation, and that a mortgage was executed by Keppel to the corporation to secure this unpaid portion of the purchase-money at the same time that the deed was executed. This being the state of the case, we must hold that the plaintiff had notice of defendant's mortgage when the mortgage to him on the land mentioned became operative, and that, therefore, his mortgage as to this land must be postponed to that of the corporation defendant. The finding to the contrary of the above is not sustained by the evidence.

But it is urged that the corporation is by the conduct of one of its officers estopped from setting up the priority of its mortgage to that of plaintiff. This contention is based on the following facts found by the court below: "That in making said loan of eighty thousand dollars to defendant Garret Keppel, and during the time negotiations and granting of said loan, F. W. Goad, Esq., was the agent and attorney for plaintiff, and was authorized to examine into the title of the land described in plaintiff's mortgage; that said Goad was informed that the legal title to the land described in said deed, dated October 23, 1883, from defendant Spring Valley Mining and Irrigating Company, to defendant Garret Keppel, was in said defendant corporation, grantor; that said Goad, as such agent and attorney, after obtaining said information, and on or about the tenth day of November, 1883, with defendant Garret Keppel called at the principal office of said corporation defendant, which was in San Francisco; that said Goad there met Willis E. Davis, the secretary of the Spring Valley Mining and Irrigating Company, and told said secretary that plaintiff, A. Montgomery, had employed him to examine the title to said land to see whether it was satisfactory; that he (said Goad) was employed to do so by said plaintiff, and was plaintiff's agent in such matters; that he wanted to see that the title was perfect; that plaintiff, A. Montgomery, wanted to know how much money he would have to pay the defendant Spring Valley Mining and Irrigating Company in order to get a perfect title, as plaintiff was taking a mortgage; that said secretary then gave as such sum \$12,978; that said Goad then informed said secretary that if he found the title perfect in other respects at Oroville, where he was going, he should put plaintiff's mortgage on record, and upon his return to San Francisco

would pay the \$12,978,—give a check for it,—and take the deed of the Spring Valley Mining and Irrigating Company, which deed, being that hereinbefore referred to, had been prepared in form, and was shown to said Goad by said secretary; that said Goad went to Oroville on or about the nineteenth day of November, 1883, and staid until the 22d, when plaintiff's mortgage was acknowledged and recorded; that said Goad returned to San Francisco, and on his way back, on the 23d, paid, at the request of defendant Garret Keppel, to the Marysville Savings Bank, \$61,138.70; that upon his return to San Francisco, and upon the twenty-fourth day of November, 1883, said Goad, at his office, delivered a check in payment of said sum, \$12,978, in the presence of defendant Garret Keppel, to said Davis, the secretary of the corporation defendant, of which check the following is a copy:—

“No. ——— SAN FRANCISCO, November 24, 1883.

“The Bank of California pay to Spring Valley Mining and Irrigating Company, or order, twelve thousand nine hundred and seventy-eight (\$12,978) dollars.

“A. MONTGOMERY.

“Per W. F. GOAD.

“Indorsed:—

“SPRING VALLEY MINING AND IRRIGATING COMPANY.

“By WILLIS E. DAVIS, Secretary.

“That said check was paid; that, upon the delivery of said check, said secretary, Davis, delivered said deed of said corporation, executed and acknowledged by the president and secretary, to defendant, Garret Keppel, and said Goad; that said Goad thereupon sent said deed to the office of the county recorder of Butte County, where the same was filed for record on the twenty-sixth day of November, 1883, as aforesaid.”

We cannot see how an estoppel can grow out of these facts. In the first place, admitting that Davis was the secretary of the corporation, it does not appear that he had authority to bind or affect the corporation by any statement he might make in regard to Keppel's purchase. Conceding that he had authority to affect the corporation by the statement of a fact, the question put to him was not as to a fact, but as to a question of law. Further, that a statement shall operate as an estoppel, it must be made with the express intention to deceive, or with such carelessness or culpable negligence as to amount to constructive fraud: *Boggs v. Merced Mining Co.*, 14 Cal. 367, 368; *Davis v. Davis*, 26 Id. 40, 41; 85 Am. Dec. 157. We

see here no intention of Davis to deceive, nor can we perceive that plaintiff was or could be misled by anything which Davis stated to his attorney. That the plaintiff was not without the means of acquiring the knowledge which he sought is too plain for argument. He might have ascertained it from the mortgagor, with whom he was communicating all the time that the negotiation for the loan was going on; or if he had inquired of the company as to the terms of its transactions with Keppel, he would, no doubt, have ascertained what they were. There is no estoppel shown by the evidence or the finding: *Davis v. Davis, supra*. The mortgage of the corporation must be held prior and superior to that of the plaintiff on the land above mentioned, and therefore the judgment and order denying a new trial must be reversed, and the cause remanded for a new trial.

Ordered accordingly.

CONSTRUCTIVE NOTICE—FACTS PUTTING PARTY ON INQUIRY: *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230, note 242. One is chargeable with actual notice of facts if he has knowledge of such facts as would lead a fair and prudent man to make further inquiries, and if such inquiries, if pursued with ordinary diligence, would have given him knowledge of the facts with notice of which he is sought to be charged: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295, and note 300. Purchaser has notice of not only facts definitely communicated to him, but of all facts which the proper use of that information, with ordinary diligence and prudence, would enable him to ascertain: *Oliver v. Sanborn*, 60 Mich. 346; *Gaines v. Summens*, 50 Ark. 322.

ESSENTIAL ELEMENT OF STATEMENT AMOUNTING TO AN ESTOPPEL is, that it was made with express intent to deceive, or with such carelessness as will be construed to be culpable negligence on part of one making statement: *Bynum v. Preston*, 69 Tex. 287; 5 Am. St. Rep. 49, note 53.

[IN BANK.]

JOHNSTON v. SAN FRANCISCO SAVINGS UNION.

[75 CALIFORNIA, 124.]

OPINION OF TRIAL COURT IS NOT THE "FINDINGS."

JUDGMENT CANNOT BE ATTACKED IN COLLATERAL ACTION on the ground that it is not supported by the findings.

JUDGMENT ENTERED AGAINST ONE IN HIS TRUE NAME, who was not named as a party defendant, nor served with summons under a fictitious name, but who came in and answered, reciting that he was sued by a certain fictitious name, is binding in a collateral proceeding, although the complaint was not amended by inserting his true name. The service of summons was waived by appearance, and the failure to insert the true name in the complaint was not such an irregularity as rendered the judgment void.

ADVERSE INTEREST TO MORTGAGOR CANNOT PROPERLY BE LITIGATED IN FORECLOSURE SUIT; but if it is put in issue, tried, and determined, the judgment is not void on a collateral attack.

DECISION OF SUPREME COURT ON FORMER APPEAL AS TO CERTAIN QUESTION INVOLVED BECOMES LAW OF CASE, and will be followed on a second appeal.

SURVIVING HUSBAND HAD POWER, UNDER ACT OF CALIFORNIA OF 1850, TO KEEP ALIVE COMMUNITY DEBT existing at the death of the wife, and secured by mortgage upon the community property, by renewals, extensions, and substitutions of the debt and the security, and the wife's descendants were bound by his acts in this regard; but he had no power to bind the interests of the descendants by a mortgage of the property for a debt contracted by him after the dissolution of the community.

ONE WHO COMES INTO EQUITY FOR RELIEF AGAINST CLOUD CAST BY FORECLOSURE PROCEEDINGS UPON HIS INTEREST, which escaped being bound by the decree in foreclosure through a slip in the proceedings, will be required, as a condition for relief, to pay his proportion of the mortgage debt, less the amount of the rents and profits of his interest received by the mortgagee, who purchased at the foreclosure sale and went into possession thereunder.

ACTION to quiet title. The facts are stated in the opinion.

Eugene R. Garber and George C. Ross, for the plaintiffs.

A. and H. C. Campbell, and Cope and Boyd, for the defendant.

HAYNE, C. An action to quiet title. In 1859 the property in controversy was the community property of James Johnston, Sen., and Petra Jara, his wife. In that year Johnston was indebted to J. and William M. Morris in the sum of seventeen thousand dollars, secured by mortgage upon the property, and "which said indebtedness was a debt contracted during the lifetime of said Petra, and after her intermarriage with said James Johnston, Sen., and was a debt of said marital community." Petra Jara died on April 30, 1861, leaving the three plaintiffs her surviving children. Prior to her death the debt had been reduced by payments, and subsequently there were many changes in the form of the indebtedness. In this regard the court finds: "That said debt was never paid, but that said James Johnston, Sen., at different times renewed and extended such debt, and the security therefor, which indebtedness and security were held by other persons than said J. and William M. Morris, but that it always existed and continued, increased by the accumulation of interest at said rate; and that new mortgages were by said James Johnston, Sen., substituted for the old from time to time as they fell due; that the loan made by the defendant herein and the mortgage given there-

for was one of such renewals and substitutions, and to the extent of \$9,150, with interest thereon from April 1, 1864, was a survival of the said debt of the marital community of said James Johnston, Sen., and Petra Jara."

In November, 1875, the defendant herein commenced an action to foreclose the mortgage mentioned in the finding quoted. The three children of Petra Jara (two of whom were then minors) were not parties defendant by name; but they came in and filed answers, reciting that they were sued by fictitious names, and setting up substantially the facts upon which they found their present claim. Judgment was entered for the plaintiff in said suit, and the property was sold, the plaintiff in said suit (defendant herein) becoming the purchaser, and in due time receiving the sheriff's deed.

The court below decided against the plaintiff James Johnston, but quieted the title of the other two plaintiffs upon condition of their paying to the defendant their proportion of the community debt of \$9,150, with interest from April 1, 1864. Each side appeals.

1. It is contended that the court, in the foreclosure suit, filed a second set of findings, and that this being unauthorized, the decree was void. It is plain, however, that what is termed the first set of findings is merely the opinion of the court. The learned judge who wrote it calls it a "memorandum." But if it had amounted to formal findings, and if the consequence had been that the second set of findings was unauthorized, as contended, the result would simply be that the document first filed would do duty as the findings in the case; and it would not matter whether it supported the judgment or not. For the question whether the findings support the judgment—in other words, whether the judgment is erroneous—cannot be raised in a collateral action. If there were no findings at all, a waiver would have to be presumed, even on appeal in the cause, and *a fortiori* in a subsequent action. It has even been held that a judgment ordered without a trial cannot be attacked collaterally: *Ex parte Bennett*, 44 Cal. 87.

2. The plaintiff James Johnston, Jr., was of age at the time of the commencement of the foreclosure suit. As above stated, he was not named as a party defendant, nor was he served with summons under a fictitious name. But he came in and answered, reciting that he was sued by the fictitious name of John Doe, and setting up the substance of his claim in the present suit. The complaint was not amended by inserting

his true name, but judgment was entered against him by his true name.

The fact that he was not served with summons is immaterial. Service of summons is waived by appearance (except in case of a minor); and we think this rule applies where the party is sued by a fictitious name, as this party appears, from his own recital, to have been. Nor is it material that his true name was not afterwards inserted in the complaint. That irregularity does not render the judgment void: *Campbell v. Adams*, 50 Cal. 203.

But it is argued for this plaintiff that his interest was adverse to that of the mortgagor, and therefore that it could not have been litigated in the foreclosure suit, and that the decree is void as to him for that reason.

Conceding for the purpose of the case that his interest was adverse within the meaning of the rule invoked, and that therefore it could not properly have been tried and determined in that suit, the fact remains that it was there tried and determined. The court had jurisdiction of the subject-matter and of the person; and this being the case, we fail to perceive how the circumstance that the issues tried were improperly mixed up with other issues can render the judgment void. If that were the rule, it would follow that questions as to misjoinder of causes of action and defense could be made on a collateral attack, which, it is hardly necessary to say, is not the case. If the party did not desire to have his interest passed upon in the foreclosure suit, and was right in his position with respect to it, he should have taken steps to present the question in that suit; or if he wished a jury trial, he should have asked for it there.

The case of *McCord v. Spangler*, 71 Cal. 418, is not in conflict with the foregoing. There the judgment of foreclosure against the party in question was by default. He did not set up his adverse interest; and the decision simply was that he was not required to do so. The other cases cited have no application. In *San Francisco v. Lawton*, 18 Id. 472, 79 Am. Dec. 187, *Croghan v. Minor*, 53 Cal. 15, and *Marlow v. Barlew*, 53 Id. 456, the question was made on appeal in the foreclosure suit. In *Fulton v. Hanlow*, 20 Id. 450, and *Flandreau v. Downey*, 23 Id. 354, the actions were not actions of foreclosure.

3. The other plaintiffs here, viz., John F. Johnston and Francis T. Johnston, were minors at the time of the foreclosure suit. And it was held upon the former appeal that the court

did not acquire jurisdiction of their persons in that suit. It is now argued for the defendant here that the surviving husband represented the community, and that therefore the children were not necessary parties, and *Carter v. Conner*, 60 Tex. 52, is cited. But that matter was decided upon the former appeal. The court there said: "As to the legal title of an undivided moiety of the lands, descent was cast upon them on the death of their mother. The object of the suit was to sell and transfer their title, as well as that of their father. They had an interest to protect it; to deny the existence of the mortgage, or to reduce the amount alleged to be secured by it; to prove that there were no community debts, or that they were less than the advance made by the mortgagee, and that the mortgagee had notice of the facts with reference to such indebtedness; that their father had exceeded his limited authority, and that the mortgagee knew it was not a mortgage in 'good faith.' As they were necessary parties to the foreclosure suit, the decree therein was void with respect to one half the lands mortgaged, unless the court acquired jurisdiction of the infants": *Johnston v. San Francisco Savings Union*, 63 Cal. 560, 561.

This decision has become the law of the case, and the question as to the effect of the decree upon the interest of these two plaintiffs is no longer open. Upon the retrial the court below so held. But it is also held that the present action being equitable in its nature, these plaintiffs would be granted relief only upon condition of their paying to the defendant here two sixths of the sum of \$9,150, and interest. Each side appeals from this decision. The two plaintiffs urge that no condition should have been imposed upon them, and that if it be imposed, the rents and profits should be set off against it. The defendant contends that the condition should have been extended to a proportion of the whole sum found due in the foreclosure suit. We will examine these positions separately.

(a) The wife having died while the act of 1850 was in force, that act must govern the case. The construction which it received was that the death of the wife did not release any portion of the property from liability to be taken for community debts, and that her descendants took it, subject to the payment of such debts; that no probate administration of the estate of the deceased wife was necessary, but that the husband had control of the property as survivor of the marital partnership for the purpose of settling up its affairs: See

Packard v. Arellanes, 17 Cal. 536; *Ord v. De la Guerra*, 18 Id. 67; *Cook v. Norman*, 50 Id. 637.

At the time of the death there was a community debt, which was secured by mortgage upon the property. This debt (or a portion of it) was kept alive by the surviving husband by renewals, extensions, and substitutions, as stated in the finding above quoted. If he had the power so to keep it alive, we think it must be regarded as the same debt; for a court of equity will look beneath the mere form of the transaction and regard its substance only. We think he had the power. If he could have conveyed the whole property in satisfaction of the debt, as was held in *Cook v. Norman*, above cited, it is hard to see why he could not attempt to save some of it for those interested by putting off the day of payment: *Rusk v. Warren*, 25 La. Ann. 314. The children were not personally liable for the debt, and could not lose, but might have gained by the course taken.

At the time of the foreclosure suit, therefore, the interests of these children were bound by the mortgage for a portion of the debt. Their interests escaped from the operation of the decree by a mere slip in the foreclosure proceedings. And while it must be held that they did so escape, yet when the owners of such interests come into equity for relief against the cloud arising from the very same foreclosure proceedings, they must be prepared to do equity. And we think it is equity that they should pay such proportion of the community debt as their share bears to the whole property, viz., two sixths: See *Kellogg v. Duralde*, 26 La. Ann. 234. The court below, therefore, was right in imposing the condition upon the plaintiffs.

(b) We think it was also right in not extending the condition to a proportion of the whole sum found due in the foreclosure suit. The equity to which effect is given by the condition depends upon whether, at the time of the foreclosure suit, the interests of the plaintiffs were bound by the mortgage. As above stated, we think their interests were bound by the mortgage for so much of the debt as was a survival of the original debt contracted during the existence of the community. This was fixed by the findings at \$9,150, with interest as specified; and after a careful examination we cannot say from the record that this finding was not justified by the evidence. The remainder of the sixty thousand dollars, then, was a debt contracted after the dissolution of the community. The question, therefore, is, whether the surviving

husband had the power to bind the interests of the children for the payment of this portion of the debt.

The position that he had such power appears to us to rest upon the idea that, notwithstanding the death of the wife, the "community" continued or might continue with reference to the children's interest. So far as we are advised, that was the case in the Spanish law. In the argument of the case of *Packard v. Arellanes*, Mr. Lies (who was well versed in Spanish law) said: "By whatever shadowy designation of feigned dominion or defeasible right the Spanish jurists call the mother's title, her heirs knew that the property must descend to them, and that their father managed it as their senior partner": 17 Cal. 530. And in *Ord v. De la Guerra*, Baldwin, J., delivering the opinion, said: "It is, moreover, held by the civil law that when the husband keeps undivided the common property after the death of the wife, it is presumed to be done with the acquiescence of the heirs, and the effect is to continue the partnership: See Escriche's Dict., verb. Bienes Gananciales, 368."

But this doctrine of the Spanish law (if such it be) did not obtain a foothold in our law. Under the act of 1850 the wife's interest vested in her decendants. "They take title of the same nature, and to the same extent, as that which vests in the survivor": *Broad v. Broad*, 40 Cal. 496; and see *Broad v. Murray*, 44 Id. 228; *Johnston v. Bush*, 49 Id. 201. The property remained subject to the community debts; and the duty of settling such debts was upon the husband. But he took as surviving partner (*Packard v. Arellanes*, *supra*, *Ord v. De la Guerra*, *supra*), not as a continuing partner. The partnership was dissolved by the death; and his duty was to settle up its affairs, not to proceed to impose new burdens upon the property in the prosecution of new enterprises.

In *Cook v. Norman*, *supra*, in reasoning to the conclusion that the surviving husband had power to convey the property in satisfaction of a community debt, the court said: "The authority to sell the property of the community belongs to him as the survivor of the community, and is the same in its nature as was his power to do so during the existence of the community." It is to be observed that this case proceeds upon the assumption that the debt in question was a community debt; and the decision was merely that a conveyance by the surviving husband was one of the modes in which the property could be made to satisfy the liability for such debts, which

liability was admitted to exist. This is widely different from saying that the property is liable for debts which are not community debts,—that is, for debts contracted after the dissolution of the community. The statement quoted was not necessary to the decision, and seems rather vague. It is to be observed, however, that what the court was speaking of was the power to convey, and that what it said of this power was, that it was the same “in its nature” as before the dissolution of the community. It was not said that this power was the same in extent as before the dissolution, and it is impossible that the court should have meant this; for that would be to say that the children’s interests could be taken for non-community debts, or in other words, that the power of the husband was unrestrained. We do not regard the case as conflicting with the views above expressed.

In *Packard v. Arellanes, supra*, the court said that the debts for which the property was liable to be taken included all debts of the community contracted for the common benefit, “whether by the deceased or by the survivor.” This remark was not necessary to the decision, which was merely that no probate administration upon the estate of the wife was necessary. There can be little doubt that such expenditures as are necessary to preserve the property *in statu quo* may be made by the surviving husband, and would be allowed upon a settlement of his accounts. But the case here is manifestly not of that character.

The interests of the children, therefore, were not bound for the debt contracted after the dissolution of the community, and there is no equity in imposing a condition as to such debt.

(c) We do not see why the rents and profits of the shares of these two children should not be set off against the amount of the condition imposed upon them. This does not refer to the rents and profits received by James Johnston, Senr. The defendant here is not James Johnston, Sen., and cannot be charged with rents and profits which it did not receive. But after it went into possession under the sheriff’s sale, it received the rents and profits of all the land except a small portion in possession of the plaintiffs. It had no right to the rents and profits of the plaintiff’s share, and should be charged therewith. It is probably true that the parties (being tenants in common) could not be made to account to each other in an independent action. But in imposing a condition, the court

must take into consideration all the circumstances in order to arrive at the justice of the case.

The other positions do not require special notice.

We therefore advise that the cause be remanded, with directions to the court below to find, from such additional evidence as may be introduced, the value of the rents and profits of the entire property since the defendant has been in possession, and also the value of the rents and profits since said time, of the portion in possession of the said two plaintiffs, and after deducting the latter amount from the former, to set off two sixths of the remainder against the amount of the condition imposed upon said plaintiffs; that in all other respects the judgment and order appealed from be affirmed; the said two plaintiffs to recover their costs of appeal.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the cause is remanded, with directions to the court below to find, from such additional evidence as may be introduced, the value of the rents and profits of the entire property since the defendant has been in possession, and also the value of the rents and profits since said time, of the portion in possession of the said two plaintiffs, and after deducting the latter amount from the former, to set off two sixths of the remainder against the amount of the condition imposed upon said plaintiffs; and in all other respects the judgment and order appealed from be affirmed; the said two plaintiffs to recover their costs of appeal.

CIRCUMSTANCES UNDER WHICH JUDGMENT MAY BE IMPEACHED COLLATERALLY: *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527; *Clark v. Thompson*, 47 Ill. 25; 95 Am. Dec. 457, and note 461; *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589; *McAnear v. Epperson*, 54 Tex. 220; 38 Am. Rep. 625; *Chicago etc. R. R. Co. v. Summers*, 113 Ind. 10; 3 Am. St. Rep. 616.

JUDGMENT CANNOT BE COLLATERALLY IMPEACHED BY PARTY on the ground that it is erroneous merely: *Indiana etc. R. R. Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650, note 654.

JUDGMENTS CANNOT BE ATTACKED COLLATERALLY for mere irregularities: *Mitchell v. Atem*, 37 Kan. 33; 1 Am. St. Rep. 231; *Ketchum v. White*, 72 Iowa, 193; *Kleyla v. Haskett*, 112 Ind. 515; and judgments which are not void, but only voidable, cannot be attacked collaterally: *Dore v. Dougherty*, 72 Cal. 232; and judgments rendered in accordance with requirements of law are valid till set aside by a direct proceeding for that purpose: *Hurlbut v. Thomas*, 55 Conn. 181; 3 Am. St. Rep. 43; nor can judgments be collaterally attacked on ground that they are erroneous merely: *Blair v. Wolfe*, 72 Iowa, 246; so that the rule seems to be that judgments cannot be attacked collat-

erally unless absolutely void: *Chicago etc. R. R. Co. v. Summers*, 113 Ind. 10; 3 Am. St. Rep. 615; *Dillard v. Central Virginia Iron Co.*, 82 Va. 734; *Dollarhide v. Parks*, 92 Mo. 178; *Applegate v. Dowell*, 15 Or. 513; *Berry v. King*, 15 Id. 165; *Reynolds v. Stockton*, 43 N. J. Eq. 211; 3 Am. St. Rep. 305.

HUSBAND MAY, AFTER WIFE'S DEATH, CARRY INTO EFFECT CONTRACTS RESPECTING THEIR COMMUNITY PROPERTY, entered into by himself alone or jointly with the wife before her death: *Brewer v. Wall*, 23 Tex. 585; 76 Am. Dec. 76. And where husband and wife are seised of land by entireties, and husband survives wife, sheriff's sale of such land upon judgment against the husband will discharge a mortgage executed by husband and wife after the entry of the judgment: *Fleck v. Zillhaver*, 117 Pa. St. 213.

[IN BANK.]

QUINN v. DRESBACH.

[75 CALIFORNIA, 159.]

ONE WILL BE BOUND BY ASSUMED AGENCY, IF HE FAILS TO REPUDIATE IT AFTER HE IS CHARGED WITH NOTICE that an agent employed by him in the commencement of a transaction is continuing to act in the matter in some way, justifying the inference that he is continuing to act in the same capacity in which he commenced.

WANT OF POSSESSION OF NOTE IS NOT CONCLUSIVE AGAINST AUTHORITY OF ONE TO COLLECT IT, as the agent of another, although it is a circumstance to be considered.

ACTION by Isaac Quinn to enjoin a sale by defendants under a deed of trust given to secure the payment of a promissory note. The facts are stated in the opinion.

J. C. Ball, Add. C. Hinkson, Jo. Craig, and J. W. Armstrong, for the appellant.

A. Morgenthal, for the respondents.

HAYNE, C. Action to enjoin a sale by defendants under a deed of trust given to secure the payment of a promissory note. The plaintiff paid the amount of the note to one Treadwell, who appropriated the money to his own use, and the question is, whether Treadwell was the agent of the payee.

Treadwell was not the actual agent of the payee in the matter. It is true that the plaintiff testifies that he was instructed by the payee to pay to Treadwell. But the payee denies this, and in view of the rule in cases of a substantial conflict in the evidence, it must be assumed that there was no actual agency. Then was there an ostensible agency?

The facts as shown by uncontradicted evidence are as follows: The land which is the subject of the deed of trust was sold by the defendant Haneke to the plaintiff. The plaintiff

gave his promissory note for eight hundred dollars, and assumed the payment of an outstanding indebtedness secured upon the property. Neither of these obligations having been met, the defendant Haneke placed the matter in the hands of Treadwell, who was an attorney at law residing in Yolo County, where the property is situated, and where the plaintiff resided. The result of Treadwell's operations was the advance by Haneke of money to pay off the outstanding indebtedness, and the taking of a new note from plaintiff covering the amount of the former note and the amount advanced by Haneke. So far, there is no kind of doubt but that Treadwell was the agent of Haneke for the collection of the principal and interest of the first note. This agency, however, terminated with the giving of the second note. This note was by its terms payable at the Bank of California in San Francisco; and the note was given to the bank for collection. The plaintiff seems to have known of this fact. He fell into the habit, however, of paying his interest to Treadwell, who assumed still to be the agent of Haneke. At least six payments of interest were made in this way. Treadwell sent the money to the bank, and the receipts therefor were forwarded to him, and by him delivered to the plaintiff. On some occasions, however, the plaintiff sent the interest to the bank through one R. W. Pendergast, who had no connection with Treadwell. Not only was interest paid to Treadwell, as above stated, but on one occasion a part payment of the principal was made to him. This payment was sent by Treadwell to the bank with the following letter:—

“WOODLAND, Dec. 24, 1881.

“THOMAS BROWN, Esq., Cashier Bank of California:—

“Herewith I send you check for \$437.50 on the part of Isaac Quinn, being \$400 principal and \$37.50 interest on note favor of Carl Haneke. I also send receipt of tax of Carl Haneke on mortgage given to secure said note, amounting to \$36, which was paid by Mr. Quinn. This makes up the amount of \$73.50 interest due December 27th. Please acknowledge receipt.

Yours,

“W. B. TREADWELL.”

This payment of the principal was properly credited on the note.

There can be no doubt but that the plaintiff believed in good faith that Treadwell remained the agent of Haneke for the collection of the principal and interest after the giving of the

second note. And this belief was justified by the conduct of Haneke. Plaintiff had made one payment of principal to Treadwell, and this payment had not been repudiated by Haneke, but was credited upon the note. Ostensible authority may be conferred by the recognition of a single act of the agent, if sufficiently unequivocal: *Wilcox v. Chicago, M., & St. P. R'y Co.*, 24 Minn. 270.

It was negligence in Haneke to have allowed the plaintiff to act under the belief that Treadwell was authorized to receive the money. Haneke was chargeable with knowledge that Treadwell continued to act in some way in the matter. He was chargeable with this knowledge, because the bank knew it, and the bank was his agent for the collection of the debt: See *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 166. Now, if Haneke knew that Treadwell was continuing to act in the matter at all, the only inference which he was entitled to draw, and the one which he ought to have drawn, was that he was continuing to act as he had commenced, viz., as his (Haneke's) agent. It was not a natural inference that Treadwell had changed his position in the matter, and was acting for the other side. The presumption was that he was assuming to act for Haneke, and we think that this was what nine out of ten business men would have thought. This being the case, Haneke ought to have repudiated the assumed agency, and not have suffered the matter to stand as it did.

The Civil Code provides that "ostensible authority is such as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess": Civ. Code, sec. 2319.

And this is the embodiment of a well-established principle of the common law, which has been called "the foundation of the law of agency": 1 Parsons on Contracts, *44; *Kasson v. Noltner*, 43 Wis. 650.

Nor does the fact that the note was not in the possession of Treadwell change the result. The want of possession of the note is a circumstance to be considered in determining the question of authority, but is not conclusive. The fact that the bank held the note for collection would not prevent the owner from collecting it himself: *Flanagan v. Brown*, 70 Cal. 257.

The circumstance that Haneke had assigned the note to his daughter, and that it was owned by her at the time of the final payment to Treadwell, is not material, because the trans-

fer was after the maturity of the note, and no notice was given to the plaintiff: *Bank of Stockton v. Jones*, 65 Cal. 437; and compare *Preston v. Grayson County*, 30 Gratt. 497; *Gibson v. Pew*, 3 J. J. Marsh. 223.

This view of the case renders it unnecessary to consider the interesting question as to the power of the court below to change its findings.

We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed, and cause remanded for a new trial.

ASSENT OF PRINCIPAL TO AGENT'S UNAUTHORIZED ACT MAY BE PRESUMED from acquiescence after notice: *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611; and see *Tier v. Lampson*, 35 Vt. 179; 82 Am. Dec. 634; *Ward v. Williams*, 26 Ill. 447; 79 Am. Dec. 385; and acts of the principal will be liberally construed in favor of a ratification: *Szymanski v. Plassen*, 20 La. Ann. 90; 96 Am. Dec. 382. Ratification of an unauthorized contract is often presumed from failure of principal to repudiate within reasonable time after notice of its existence, provided other party in good faith expends money or labor under the contract: *Hoosac Mining and Milling Co. v. Donat*, 10 Col. 529.

PAYMENT OF MONEY DUE ON WRITTEN SECURITY, TO AGENT WHO HAS NOT EITHER POSSESSION of the security or express authority to receive such money, is not good, and the principal may compel the debtor to pay it again: *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; and see *Doubleday v. Kress*, 50 N. Y. 410; 10 Am. Rep. 502.

KAHN v. EDWARDS.

[75 CALIFORNIA, 192.]

STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST ACCOUNT STATED FROM DATE OF STATEMENT, where an open account is verbally stated before the items comprising it are barred.

ACTION upon an account stated. The opinion states the facts.

Hudson Grant, for the appellant.

C. P. Harding, for the respondents.

FOOTE, C. This is an action upon an account stated. Both of the defendants pleaded the statute of limitations of two

years, under section 339, subdivision 1, Code of Civil Procedure. One of them, Goodin, further pleaded, in bar of the action, that he, by agreement, had been absolved from paying the account sued on.

The trial court found that the amount of the account was correct; that no such agreement as Goodin claimed had in fact existed; but held that the cause of action as to both defendants was barred by the statute of limitations.

From the judgment roll, it appears that the defendants were indebted upon an open account to a partnership of whose effects the plaintiff was the sole owner at the time of the institution of this suit. Before the statute of limitations had barred any portion of that account, the parties met and agreed orally upon the balance that was due from the defendants to the plaintiff; in other words, an accounting was had between the parties, and the balance which the plaintiff claimed to be due from the defendants, they then and there orally admitted to be due, as he claimed, and agreed to pay.

At the time when this action upon the "account stated" was instituted, two years had not elapsed since the agreement had been made to pay the ascertained balance due on the original account. Therefore, the cause of action upon which this suit is based was not barred, and the plaintiff should have had judgment upon the finding.

"An open account already barred by the statute of limitations cannot be relieved from the bar of such statute by an oral statement of such account. . . . Where, however, the demand is not barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action thus brought into existence from the date of the settlement and new promise arising thereunder, and if verbal, an action may, under subdivision 1 of section 339, Code of Civil Procedure, be brought within two years after such settlement": *Auzerais v. Naglee*, 74 Cal. 67.

The judgment, therefore, should be reversed, and the court below directed to render judgment upon the findings for the plaintiff.

BELCHER, C. C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to render judgment upon the findings for the plaintiff.

STATUTE OF LIMITATIONS, WHEN BEGINS TO RUN ON ACCOUNTS STATED: *Norton v. Larco*, 30 Cal. 127; 89 Am. Dec. 75, 80, 85, note; and see *Menges v. Frick*, 73 Pa. St. 137; 13 Am. Rep. 731, note 733. Statute of limitations does not run against accounts between partners until the accounts are settled and a balance struck and agreed upon: *Hendy v. March*, 75 Cal. 566.

[IN BANK.]

CHICAGO QUARTZ MINING COMPANY v. OLIVER.

[75 CALIFORNIA, 194.]

PATENT ISSUED BY UNITED STATES TO CENTRAL PACIFIC RAILROAD, UNDER ACT OF CONGRESS OF 1862, AND AMENDATORY ACT OF 1864, IS NOT CONCLUSIVE EVIDENCE that the land covered by the patent is non-mineral in character; and one who claims the land under a subsequent mining patent may show, in an action by him against a grantee of the railroad company, that the land is mineral, and therefore excepted from the operation of the grant to the company.

ACTION to quiet title. The facts are stated in the opinion. *Gaylord and Searls, William Singer, Jr., and H. V. Reardan*, for the appellant.

A. Burrows, for the respondent.

SHARPSTEIN, J. This is an action to quiet title. The plaintiff claims under a mining patent issued August 16, 1883; defendant under a patent issued to the Central Pacific Railroad Company, dated April 18, 1870.

The only question is, whether the title to the premises in controversy vested in the railroad company under the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," etc., approved July 1, 1862, and the act amendatory thereof, approved July 2, 1864.

The land is within the boundaries of one of the sections covered by that grant, and if not reserved or excepted from it, undoubtedly vested in the railroad company. So that the question is, Was the land reserved or excepted from the grant to the railroad company?

In the original act there is a proviso that all mineral lands shall be excepted from its operation, and in the amendatory act that the grant shall not include any mineral lands. And the Revised Statutes provide that "no act passed at the first session of the thirty-eighth Congress granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the

thirtieth day of January, 1865, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise officially provided in the act or acts making the grant": U. S. R. S., sec. 2346.

The patent under which defendant claims contains this clause: "Excluding and excepting from the transfer by these presents 'all mineral lands,' should any be found to exist in the tracts described in the foregoing."

The court found "that all the land described in said complaint as the Chicago quartz mine is valuable gold-bearing mineral land, and has been notoriously known and frequently worked as such ever since 1861."

This finding is justified by the evidence, and is not assailed by appellant. But while conceding the fact to be as found, he contends that the title to the land, nevertheless, vested by the patent in the railroad company. As stated by appellant's counsel, his contention is, that "mineral land did not pass by the grant [to the railroad company], and the officers of the land department had no authority to designate by the patent any land which was mineral in character. The law required them to designate only such land as was non-mineral in character, and the issuance of the patent under the law, aided by the presumption which the law attaches to the performance of all official acts, was a conclusive determination that the land designated in the patent was non-mineral, and the reservation in the patent was meaningless."

The act of Congress making the grant does not in express terms require any officer or officers of the government to identify and exclude from the patent mineral lands lying within the alternate sections granted to aid in the construction of the road. In the original act all mineral lands are expressly excepted from its operation, and in the amendatory act it is enacted that the grant shall not include mineral lands, or any lands returned and denominated as mineral lands. "Whatever is included in the exception is excluded from the grant; and it therefore often becomes important to ascertain what is excepted in order to determine what is granted": *Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 733.

It is not claimed that the officers on whom was devolved the duty of issuing patents for the lands granted could add anything to the grant. But it is claimed the patent is conclusive evidence that the grant included all the land covered by the patent. The supreme court of the United States has

said: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that it had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved for sale or dedicated to special purposes, or had been previously transferred to others": *Smelting Co. v. Kemp*, 104 U. S. 636. This is quoted approvingly in the opinion of the court delivered by Field, J., in *Wright v. Roseberry*, 121 Id. 488.

In *McLaughlin v. Powell*, 50 Cal. 64, the plaintiff in ejectment introduced a patent to the Western Pacific Railroad Company, from which he deraigned title to the demanded premises, similar to that relied on by appellant in this case, and rested. "The defendant then offered to prove that the land was mineral land, containing large quantities of cinnabar and quicksilver, and that he had held the land as a mining claim since October, 1866, under the rules and regulations and customs of miners in the district where the land was situated. The plaintiff objected to the testimony as irrelevant, and the court sustained the objection. The plaintiff recovered judgment, and the defendant appealed from the judgment and from an order denying a motion for a new trial." This court said: "The exception contained in the patent introduced by the plaintiff is part of the description, and is equivalent to an exception of all the subdivisions of land mentioned which were 'mineral' lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. . . . We think the defendant should have been allowed to prove that the demanded premises were mineral lands."

The judgment and order were reversed.

The doctrine laid down in that case, if applied to the case now in hand, is decisive of it. And we think it in harmony with the cases decided by the supreme court of the United States. It has not been overruled in any reported case in this state, although it is claimed to have been in the unreported case of *Central Pacific R. R. Co. v. Leavenworth*. No opinion was filed in that case, and we are unable to determine from the record that this question was passed on in that case.

Those portions of finding 3 which are alleged to be unsupported by the evidence are, in our opinion, immaterial. It is therefore unnecessary to determine whether the evidence is sufficient to justify them. The material facts found are supported by the evidence.

Judgment and order affirmed.

UNITED STATES LAND PATENT, CONCLUSIVENESS OF: See *Teschemacher v. Thompson*, 18 Cal. 11; 79 Am. Dec. 151, and note 162. To attack a patent not void on its face, the party must show affirmatively that the land was not of any special character which would subject it to acquisition under any law of the United States: *Leviston v. Ryan*, 75 Cal. 293. But the patent from the United States to the city and county of San Francisco for the pueblo lands confirmed to it under the acts of Congress of 1851 and 1864 by decree of the United States circuit court, which patent conforms in its description of lands granted to the final survey made, as provided in the latter act, in accordance with the instructions of the commissioner of the general land-office, is conclusive evidence, as against the state of California, of the right of the city and county of San Francisco to all the lands embraced in the survey, etc.; and the state of California is not a "third person," within the meaning of section 15 of the act of March 3, 1851: *People v. City and County of San Francisco*, 75 Cal. 388.

[IN BANK.]

ESTATE OF NEWMAN.

[75 CALIFORNIA, 213.]

ADOPTED CHILD IS ENTITLED TO SUCCEED BY INHERITANCE TO ESTATE OF ADOPTING PARENT, under sections 227, 228, and 1386 of the Civil Code of California, which provide that the adopted child shall be "regarded and treated in all respects as the child of the person adopting," and shall "have all the rights and be subject to all the duties of the legal relation of parent and child."

ACTION FOR DIVORCE IS PROCEEDING IN REM, SO FAR AS IT AFFECTS STATUS OF PARTIES and the custody of their minor children, and a service of summons by publication on a non-resident defendant is good.

AMENDED AFFIDAVITS OF SERVICE OF SUMMONS BY PUBLICATION MAY BE RECEIVED BY COURT after judgment has been rendered in an action for divorce, and before the roll is made up.

AFFIDAVITS OF SERVICE OF SUMMONS BY PUBLICATION AGAINST NON-RESIDENT DEFENDANT IN ACTION FOR DIVORCE, AND RECITALS THEREOF in judgment, are conclusive upon a collateral attack. The affidavit on the application for the order of publication, and the order therefor, are not part of the judgment roll, and cannot be considered.

JUDGMENT BY DEFAULT, RENDERED BEFORE TIME ALLOWED DEFENDANT TO ANSWER HAS EXPIRED, IS ERRONEOUS SIMPLY, and not void, and can be attacked only upon motion or by appeal, and by the party aggrieved.

ORDER FOR ADOPTION OF MINOR IS NOT VOID BECAUSE MADE IN OPEN COURT instead of by the judge thereof at chambers, as contemplated by section 227 of the Civil Code of California; at all events, where the order was a writing signed by the judge, and filed in the adoption proceedings, although it recited that it was made "by this court."

JUDGE OF SUPERIOR COURT OF ONE COUNTY, WHO HOLDS COURT IN ANOTHER, MUST BE PRESUMED TO HAVE LAWFULLY DONE SO, in the absence of evidence to the contrary, upon the request of the governor of

the state, or of a judge of the court in the latter county, as provided for by section 71 of the Code of Civil Procedure of California.

JUDGMENT OF DIVORCE, AFTER BEING SIGNED BY JUDGE AND FILED WITH CLERK, IS BINDING upon the parties and their privies, although not entered by the clerk.

APPEAL by Michael Newman from an order of the superior court of Los Angeles County granting letters of administration to Mary Maldonado on the estate of Bernard Newman, deceased. The decedent died intestate, November 15, 1886, a resident of the county of Los Angeles, and leaving no blood relations nearer than brothers and sisters. On November 24th following, the respondent Mary Maldonado, the mother and guardian of one George B. Maldonado, a minor, filed a petition for letters of administration on the estate, claiming to be entitled thereto as the guardian of the minor, who was alleged to be the adopted son of the deceased. The appellant, Michael Newman, a brother of the deceased, filed his petition for letters on December 6, 1886, and also filed grounds of opposition to the petition of the respondent, alleging that George B. Maldonado was not the adopted son of the deceased, and was not entitled to succeed to the estate, and that the respondent was a married woman. On the hearing of the contest, the respondent, against the appellant's objections, introduced in evidence the record of the proceedings in the superior court of Los Angeles County in the matter of the adoption of the child, which consisted of a petition to the court, filed June 28, 1886, and an order made the same day for his adoption by B. T. Williams, who appeared to have been at the time the judge of the superior court of Ventura County. The petition in the adoption proceedings alleged that the respondent was the mother of the child; that the father, J. M. Maldonado, was a non-resident of the state; that he had been adjudged guilty of adultery, and deprived of the custody of the child on the ground of neglect; and that on account of the adultery and neglect, the respondent had been divorced from him. The petition stated the consent of the respondent to the adoption, and prayed the adoption by the deceased. The order, after reciting that the respondent had consented, in writing, to the adoption, that she had been previously divorced from her husband, the father of the child, and that he had been adjudged guilty of adultery by the judgment in the action for divorce, and had been deprived of the custody of the child, proceeded: "It is therefore ordered and decreed, and declared by this court, that said George Bernard Maldonado shall henceforth

be the adopted son of said Bernard Newman, and shall be regarded and treated as the child of said Bernard Newman.

"Done in open court this twenty-eighth day of June, 1886.

"B. T. WILLIAMS, Judge."

The respondent also, for the purpose of showing that she had been divorced from her husband prior to the adoption proceedings, offered in evidence, against the appellant's objections, the complaint and judgment in an action brought by her in the superior court of Los Angeles County against her husband for a divorce on the ground of adultery. The complaint in that action appeared to have been filed July 28, 1885. The judgment of divorce was signed by the judge October 19, 1885, was filed with the clerk October 22, 1885, and was entered January 5, 1887. The judgment recited the default of the defendant, and that he had been duly served with summons by publication. The appellant, for the purpose of showing the invalidity of the judgment, offered in evidence an affidavit for an order of publication of summons, which appeared to have been filed July 19, 1885, nine days before suit was brought, and which recited that the defendant was a resident of Phoenix, Arizona; an order of court, made on the same day, directing the summons to be published in a certain newspaper of Los Angeles at least once a week for two months, and that a copy of the complaint and summons be forthwith deposited in the post-office, directed to the defendant; an affidavit, made October 19, 1885, by the principal clerk of the newspaper, showing that the summons had been published for "two consecutive months, commencing July 1, 1885, and ending October 30, 1885," respectively, twenty-seven days before suit was brought, and eleven days after the judgment was signed; and also an affidavit of the attorney for the plaintiff, showing that on July 18, 1885, ten days before suit was brought, he had deposited in the post-office at Los Angeles a copy of the complaint and summons, addressed to the defendant at Phoenix, Arizona. The respondent thereupon, against the appellant's objections, offered in evidence an amended proof of publication of summons in the divorce suit, filed January 5, 1887, *nunc pro tunc* as of October 19, 1885; an amended proof of deposit in the post-office of a copy of the complaint and summons in that suit, filed January 5, 1887, *nunc pro tunc* as of October 19, 1885; and an order made January 5, 1887, allowing the filing of the amended proofs of publication and deposit, and ordering the entry of judgment in

the suit *nunc pro tunc* as of October 19, 1885. The court thereupon ordered letters of administration to be issued to Mary Maldonado.

Matthew I. Sullivan and Stephen M. White, for the appellant.

Lucien Shaw and James M. Damron, for the respondent.

PATERSON, J. The provisions of the Civil Code bearing upon the first question presented for our consideration are the following:—

“Sec. 227. The judge must . . . make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

“Sec. 228. A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.”

“Sec. 1386. When any person having title to any estate dies without disposing of the estate by will, it is succeeded to and must be distributed . . . in the following manner:—

“1. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children, by right of representation.”

Under these provisions, we think that an adopted child is entitled to succeed by inheritance to the estate of the adopting parent. The provisions of sections 227 and 228 extend to all the rights and duties of natural parents and children. The language is general and comprehensive. The use of the word “issue” in section 1386 does not limit the right of inheritance to the natural children only. That section prescribes the rule of inheritance. The word “issue” is there used in the same sense as the words “child” and “children.” If the adopted child is by virtue of its *status* to be “regarded and treated in all respects as the child of the person adopting,” and is to “have all the rights and be subject to all the duties of the legal relation of parent and child,” the right to succeed to the estate of the deceased parent must be included: *Estate of Wardell*, 57 Cal. 491; see also *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321.

2. So far as the action of *Maldonado v. Maldonado* affected the status of the parties and the custody of the child, it was a proceeding *in rem*, and service by publication in such cases is good: *Pennoyer v. Neff*, 95 U. S. 714. The recital in the judgment that the defendant was duly served with process is consistent with the proof of service. It is the fact of service which gives the court jurisdiction,—not the proof of service,—and the court had authority to receive the amended affidavits of service after judgment and before the roll was made up: *Mason v. Messenger*, 17 Iowa, 261; *Rickards v. Ladd*, 4 Pac. C. L. J. 52; *Allison v. Thomas*, 72 Cal. 562.

The affidavits of service and the recitals in the judgment are conclusive. The affidavit on application for an order of publication, and the order of publication, cannot be considered. They are no part of the roll: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *McCauley v. Fulton*, 44 Cal. 355. *Belcher v. Chambers*, 53 Id. 635, is not in point. In that case, as in *Pennoyer v. Neff*, *supra*, the judgment considered was a personal judgment against a non-resident without personal service of process. So far as the rule established in *Hahn v. Kelly*, *supra*, is applicable to proceedings *in rem*, it has not been overruled. The judgment referred to in that case was for money,—the deficiency after foreclosure and sale.

The court has jurisdiction of the defendant, and the subsequent proceedings, from the time publication of summons was complete: Code Civ. Proc., sec. 416.

The fact that judgment was rendered upon default entered before the time allowing the defendant to answer had expired rendered the judgment erroneous simply, not void. A judgment thus rendered can be attacked only upon motion or by appeal, and by the parties in interest. Maldonado is the only party aggrieved by the decree, and he is the only one who can attack it in any way: *Alderson v. Bell*, 9 Cal. 321; *Mitchell v. Aten*, 37 Kan. 33; 1 Am. St. Rep. 231.

3. It is contended that the order is void because it was made by the court, and not by the judge. The order appears to have been made in open court, but it is a written order, signed by the judge and filed in the proceedings. The words "by this court" in the order may be treated, we think, as surplusage. An order made by the judge at chambers in a case requiring action by the court may, for good reasons, be held to be invalid, but no such reasons can be urged in cases like this. The power which the judge might have exercised in his cham-

bers was exercised in open court; and the fact that the clerk and sheriff were present cannot affect the validity of his judicial act.

4. The judge who signed the order—Hon. B. T. Williams of Ventura County—had the same power as the judge of Los Angeles County, for whom he was acting: Code Civ. Proc., sec. 71. It must be presumed, in the absence of a showing to the contrary, that he was acting upon the request of the governor, or of one of the judges of the superior court of Los Angeles County.

5. The decree was signed by the judge on October 19, and was filed with the clerk on October 22, 1885. Thus rendered, it was binding on the parties and privies, although not entered until January 5, 1887. The clerk could not, by his failure to perform a ministerial duty, abridge the rights of any party interested: *Casement v. Ringgold*, 28 Cal. 339; *Gray v. Palmer*, 28 Id. 422.

The order is affirmed.

ADOPTION OF CHILD, EFFECT IN ANOTHER STATE: *Smith v. Derr*, 34 Pa. St. 126; 75 Am. Dec. 641, and note 642.

JURISDICTION IN DIVORCE CASES where one of the parties is a non-resident: *Jenness v. Jenness*, 24 Ind. 355; 87 Am. Dec. 335, and note 340; compare *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447, and note 453.

VALIDITY OF DECREE OF DIVORCE IS NOT ASSAILABLE on the ground that the special district judge who tried the case, and rendered the decree, was the county judge of the county when the trial began: *Alsup v. Jordan*, 69 Tex. 300; 5 Am. St. Rep. 53.

WARD v. DOUGHERTY.

[75 CALIFORNIA, 240.]

POSSESSION OF DEED BY GRANTEE NAMED THEREIN, OR BY ONE CLAIMING UNDER HIM, is *prima facie* evidence of its delivery.

DEED DULY EXECUTED IS PRESUMED TO HAVE BEEN DELIVERED AT ITS DATE, under section 1055 of the Civil Code of California.

IDENTITY OF GRANTOR WITH DEFENDANT IS PRESUMED FROM IDENTITY OF NAME under section 1963 of the Civil Code of California, in an action to quiet title by a person claiming under a deed from a grantor having the same name as the defendant.

DECREE OF FORECLOSURE OF LIEN OF STREET ASSESSMENT CANNOT BE COLATERALLY ATTACKED by one who claims under the defendant therein, by showing that prior to the decree the assessment had been paid, the decree being valid on its face, and rendered in an action in which the court had jurisdiction of the subject-matter and of the person of the defendant.

QUITCLAIM DEED EXECUTED BY PURCHASER OF LAND AT SHERIFF'S SALE AFTER TIME FOR REDEMPTION HAS EXPIRED, and before the sheriff's deed is given, is equivalent to an assignment of the sheriff's certificate of sale; and if the sheriff afterwards executes a deed to the purchaser, the same is void as between the parties.

ACTION to quiet title. The facts are stated in the opinion.

John J. Coffey, for the appellant.

W. M. Pierson, for the respondent.

SEARLS, C. J. This is an action to quiet title to a lot of land at the corner of Van Ness Avenue and Broadway, San Francisco.

Plaintiff deraigned title through a quitclaim deed executed by the defendant, John Dougherty, on the fourteenth day of June, 1870, to one Patrick J. Tannian, and recorded June 18, 1870, at the request of one Julius George.

Plaintiff, in further support of title in herself, introduced a deed from P. J. White, sheriff of the city and county of San Francisco, to James Gaffney (under whom plaintiff claims by sundry mesne conveyances), dated July 5, 1883, and executed pursuant to a decree, order of sale, and sale, in the case of *James Gaffney v. Barnaby Dougherty*, in an action to foreclose the lien of a street assessment, under a contract made the ninth day of September, 1866.

It appears from the judgment roll that Denis Mahoney, one of the defendants in the action, set up in a cross-complaint the prior lien upon the property of a mortgage thereon executed May 26, 1864, by Barnaby Dougherty to David Mahoney and assigned to him, the said Denis Mahoney, by the mortgagee, David Mahoney.

The lien of the street assessment was declared to be paramount to that of the mortgage. Date of decree, December 14, 1867; date of sale thereunder, January 22, 1868.

Defendant claims title to the premises under a sheriff's deed dated July 3, 1883, and executed pursuant to a foreclosure and sale of the premises under the mortgage above mentioned, in an action in which Denis Mahoney was plaintiff, and B. Dougherty defendant. Decree entered March 19, 1868; sale April 14, 1868, to Denis Mahoney, who received a certificate of sale and assigned the same to the defendant on the twenty-second day of September, 1868, with all his right, title, and interest in the premises.

James Gaffney was made a party defendant in this last-

named action, but there was a dismissal as to him, and no decree was taken against him.

Upon the closing of the testimony on the part of plaintiff, defendant moved for judgment as in case of nonsuit, upon the ground that there was no proof of delivery of the deed from defendant Dougherty to P. J. Tannian. The motion was overruled, and this action is assigned as error.

We find in the record no specification of the particulars in which the evidence is alleged to be insufficient, but, waiving this point, we think there was sufficient evidence of the delivery of the deed by the defendant to the grantee therein named. It was regularly executed, acknowledged, and recorded as a conveyance of title to the premises in dispute. It formed a part of the regular chain of title from the defendant to plaintiff, and was produced and offered in evidence at the trial by the attorney of the latter.

It is hardly necessary to say that a deed only takes effect upon delivery, and that without such delivery it has no validity.

Possession of a deed of property, however, by the grantee therein named, and upon the same principle by one holding by conveyance of the same property under him, is *prima facie* evidence of its delivery.

The question of delivery being one of fact, and possession being only primary evidence of delivery, he who disputes such fact may rebut the presumption arising from possession by showing that there has in fact been no delivery; but it has been said that where a deed is found in possession of the grantee, nothing but the most satisfactory evidence of non-delivery should prevail against the presumption: Devlin on Deeds, sec. 294.

In *Tunison v. Chamblin*, 88 Ill. 379, it was said: "When a deed duly executed is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land. It cannot be that a grantor may assail a conveyance fifteen or twenty years after a deed has been made, and recover the land by merely swearing that he never delivered the deed. The unsupported evidence of the grantor surely cannot be permitted to have such effect, especially when the evidence of such a grantor is in many material matters contradicted, and who

seems to act on a low moral plane. To so hold would render all titles insecure, and would be disastrous in the extreme. Any system of jurisprudence adopting rules for the attainment of justice can never sanction a rule fraught with such unjust and iniquitous results."

In *Branson v. Caruthers*, 49 Cal. 374, it was said: "The production of the deed of gift by the attorneys of the wife [the grantee] was sufficient evidence of its delivery and acceptance": *Barr v. Schroeder*, 32 Id. 609.

Section 1055 of the Civil Code provides that "a grant duly executed is presumed to have been delivered at its date."

It may be inferred from the decision in *Boyd v. Slayback*, 63 Cal. 493, that this court was of opinion that this inference only applied to the time, and not to the fact, of delivery. In other words, that the fact of delivery must be proven by other and competent evidence, and that when proven, the presumption of the code as to the time of such delivery applies. In view of this interpretation, the fact of delivery of the deed from defendant to Tannian having been sufficiently proven by its production by the attorneys of plaintiff, who held under him, the date of such delivery will, under the code, be deemed to have been the date of the instrument, viz., June 14, 1870.

So, too, John Dougherty, who executed the deed, is presumed, under section 1963 of our Code of Civil Procedure, to be the John Dougherty who is defendant in the cause, upon the theory that identity of person is presumed from identity of name.

What is said here will apply with like effect to similar errors assigned upon the introduction of other deeds.

The only other alleged error is predicated upon the refusal of the court to permit defendant to testify in answer to the following question: "Do you know of your own knowledge whether the assessment for that street work was paid by Denis Mahoney?"

The proffered evidence involved an attempt to show by parol in a collateral attack that the decree of foreclosure of the lien of the street assessment, and the sale and deed thereunder, were void by reason of the payment of such assessment.

Both plaintiff and defendant are in privity of estate with Denis Mahoney, and the decree, being fair on its face, and rendered in a case where the court had jurisdiction of the

subject-matter and of the person of defendant, is not subject to collateral attack.

Again, if we dismiss from view the title of plaintiff based upon the sale under foreclosure of the lien for street assessment, which was found to be paramount to the lien of the mortgage under which defendant claims title, the case stands thus: Defendant held a certificate of purchase under the foreclosure sale. The time for redemption had expired. He had a perfect equitable title, which only lacked a sheriff's deed to turn it into a legal title. In this condition of things, he conveyed by his quitclaim deed on the fourteenth day of June, 1870, to Tannian, from whom plaintiff derails title. In *Green v. Clark*, 31 Cal. 592, it was held that if one who has purchased land at sheriff's sale quitclaims his interest in the same before a sheriff's deed is given, the quitclaim is equivalent to an assignment of the sheriff's certificate of sale, and if the sheriff afterward give a deed to the purchaser, the deed is void as between the parties.

It follows that were we to concede the error upon the exclusion of defendant's testimony to be well assigned, the conclusion rendered by the court below was correct.

Judgment affirmed.

DELIVERY OF DEED, SUFFICIENCY OF, AND WHEN COMPLETE: *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *Hinson v. Bailey*, 73 Iowa, 544; 5 Am. St. Rep. 700, and note 701.

DELIVERY OF DEEDS IS PRESUMED TO HAVE BEEN MADE AT THEIR DATE: *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491, and note; *Briggs v. Fleming*, 112 Ind. 313.

IDENTITY OF NAME IS PRIMA FACIE EVIDENCE OF IDENTITY OF PERSON, and is sufficient proof of the fact, in the absence of all evidence to the contrary: *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768.

QUITCLAIM DEED, WHAT INTEREST PASSES BY: *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187; *Rowe v. Beckett*, 30 Ind. 154; 95 Am. Dec. 676; *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243.

OTTO v. JOURNEYMAN TAILORS' PROTECTIVE AND BENEVOLENT UNION.

[75 CALIFORNIA, 308.]

COURTS WILL INTERFERE FOR PURPOSE OF PROTECTING PROPERTY RIGHTS OF MEMBERS OF UNINCORPORATED ASSOCIATIONS in all proper cases, and when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character.

MEMBER OF UNINCORPORATED ASSOCIATION, IN GOOD STANDING, ENTITLED TO PARTICIPATE IN ITS BENEFIT FUND, HAS PROPERTY RIGHTS INVOLVED, which, if violated, by the association, entitles him to the protection of the courts.

MEMBER OF UNINCORPORATED ASSOCIATION MAY BE EXPELLED THEREFROM for a violation of such of its established rules as have been subscribed or assented to by the members, and as provide expulsion for such violation, or for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute.

UNINCORPORATED ASSOCIATION ACTS IN QUASI JUDICIAL CHARACTER IN MATTER OF EXPULSION, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive like that of a judicial tribunal. The courts will, however, decide whether the ground for expulsion is well taken.

MEMBER OF UNINCORPORATED ASSOCIATION WHO IS EXPELLED THEREFROM, nominally for offense which would warrant such expulsion, but in reality for an offense which, by the rules of the association, is punishable by fine only, will be reinstated by the courts.

MANDAMUS. The opinion states the facts.

John C. Hall and John M. Days, for the appellant.

Oliver P. Evans, Rhodes Borden, and L. M. Hoefler, for the respondent.

SEARLS, C. J. This is an appeal from a writ of mandate issued by the superior court, commanding appellant to reinstate the respondent, August Otto, to membership in the society, and to restore him to all the rights, privileges, and immunities of membership therein.

The appellant is, and since 1873 has been, an unincorporated association composed of about two hundred persons, tailors by occupation, organized for the purpose of transacting the business of a benevolent association, of improving the condition of its members, and for protection against unjust and arbitrary encroachment of capital.

The association has a constitution and by-laws, providing for its government, and has a benevolent fund to which mem-

bers may, under proper circumstances, become entitled to a certain extent.

Plaintiff became a member about October 1, 1883, and continued such in good standing until June 9, 1884, when, as the court finds, he was expelled without any hearing or trial whatever.

On May 24, 1884, plaintiff was a regular member in good standing of the association, and of the benevolent fund branch of the association, and entitled to its pecuniary benefits, when a question arose in reference to the employment of non-members of the association by a firm of tailors, and such proceedings were had that a special meeting of all members of shop meetings was called, at which it was decided, by a vote of eighty-nine for and thirty-nine against, to declare a strike against the offending firm, for which plaintiff was laboring.

By the constitution and by-laws, it is provided that a two-thirds majority of the members shall be necessary to ordering a strike. There were at the time 176 members entitled to vote on the question, of whom two thirds did not vote, but two thirds of those present at the meeting did vote in favor of the strike. Plaintiff opposed such strike. He at first expressed a determination to abide by the decision, but finally, upon being offered work by the offending firm, accepted such work, and was therefor expelled from the association, as hereinbefore stated, and all union members were informed thereof, whereby he has since that date, under the rules of the association, been prevented from procuring employment in union shops, which seemed to include most of the better class of shops in the city (San Francisco).

The expulsion was invalid in this: members working for parties against whom a strike is declared are subject to fine of not less than ten dollars nor more than one hundred dollars, and no other or further penalty is provided, so far as appears by the constitution and by-laws.

On the 17th of July, 1884, the striking members of the union agreed to terminate the strike, and to return to work for the employers of the plaintiff, on the condition that they would discharge the latter, which was done, and the strike thus terminated.

On the 13th of October, 1884, the central body of the union rescinded the expulsion of plaintiff, and on the same day of the same month other charges involving conspiracy on the part of plaintiff, and others, against and to the injury of the

society and its members, were preferred. The twenty-seventh day of October was set for the trial of plaintiff upon the charges, which trial subsequently took place, and plaintiff was found guilty of conspiracy, and expelled from the society.

The court below finds as bearing upon this point, in substance: 1. That the expulsion of June 9th was for working for a firm against whom a strike had been ordered; 2. That the rescission of October 13th was not made in good faith, and was only for the purpose of expelling him again; 3. That the first and second expulsions were for one and the same offense, and was not called conspiracy until the charges were drawn by an attorney, and then only that a charge might be formulated which would warrant expulsion, independent of the constitution and by-laws; 4. That the trial of October 27th was by the central body, and not by the union as a whole; that this was not fair, was contrary to natural justice, not provided for by the constitution or by-laws, etc.

The findings fully sustain the allegations of the petition, and warrant the judgment of the court, provided it is within the province of that tribunal to investigate and question the action of the appellant in expelling plaintiff.

Appellant specifies many particulars in which it is claimed the decision of the court is not supported by the evidence.

We have examined the testimony, and are of opinion that it warrants the findings of the court in all essential particulars.

To enumerate the several objections, and specify the evidence in support of the findings excepted to, would extend the decision beyond reasonable limits, without any corresponding benefits to the parties; hence we dismiss this branch of it thus summarily.

Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character.

Respondent, as a member of the association in good standing, who had paid all of his dues and assessments, and who was entitled to participate in the benefit feature of the company, had property rights involved, which, if violated, entitles him to the protection of the courts.

The right of expulsion from associations of this character may be based and upheld upon two grounds: 1. A violation of such of the established rules of the association as have

been subscribed or assented to by the members, and as provide expulsion for such violation; 2. For such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute.

We content ourselves with stating the propositions thus broadly, and for the purposes of this case need not refer to the numerous authorities defining and limiting the power.

In the matter of expulsion, the society acts in a *quasi* judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive like that of a judicial tribunal: *Commonwealth v. Pike Benevolent Society*, 8 Watts & S. 250; *Burt v. Grand Lodge F. & A. M.*, 44 Mich. 208; *Robinson v. Yates City Lodge*, 86 Ill. 598.

The courts will, however, decide whether the ground for expulsion is well taken: *Hirschl on Law of Fraternities*, 55; *Savannah Cotton Ex. v. State*, 54 Ga. 668.

It has been held in reference to the expulsion of members from societies of this character that the courts have no right to interfere with the decisions of the societies, except in the following cases: "1. If the decision arrived at was contrary to natural justice, such as the member complained of, not having an opportunity to explain misconduct; 2. If the rules of the club have not been observed; 3. If the action of the club was malicious, and not *bona fide*": *Hirschl on Law of Fraternities*, 56; *Dawkins v. Antrobus*, 44 L. T. 557; L. R. 17 Ch. D. 615; *Lambert v. Addison*, 46 L. T. 20.

Article 25 of appellant's constitution provides as follows: "If any member defrauds this union, he shall be dealt with as the central body may decide."

Beyond this, no specific provision appears in the constitution or by-laws under which members may be expelled.

The contention of appellant is, that the power of expulsion is inherent in every society, and that the offense of which plaintiff was found guilty was sufficient ground for expulsion, as matter of law, irrespective of any provision of the constitution or by-laws.

We subscribe to that portion of the proposition which asserts the inherent right of expulsion, subject, however, to the limitations hereinbefore expressed.

For the purposes of this case, we assume, also, without deciding,—1. That the charges and specifications against plaintiff were sufficient, upon being proven, to warrant his expulsion under the inherent right so to do mentioned; 2. That the central body,—that is to say, the board of delegates of shop societies,—as contradistinguished from the entire body of members, may exercise the power of expulsion.

Conceding these propositions, however (so far as the latter is concerned, we doubt if it can be maintained), and the facts as found by the court still remain, that plaintiff was really and in fact found guilty for no other offense than that for which he was expelled in the first instance, viz., for working for parties against whom a strike had been ordered; that the expulsion was not in good faith, was not fair, and was contrary to natural justice; that the charge of “conspiracy to injure and destroy the union” was in substance but a pretext to punish him for an offense only subjecting him to a fine, in a manner wholly different from the imposition of the penalty provided therefor, etc.

We think, as before stated, that there was evidence from which the facts as found were fairly deducible.

These facts raise the inevitable conclusion that the trial and conviction of plaintiff was a travesty upon justice, and lacking in the essential elements of fairness, good faith, and candor, which should characterize the action of men in passing upon the rights of their fellow-men.

We are referred to the provision of appellant's constitution, which provides that “any member having a grievance shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final.”

No doubt when action is properly taken in the manner indicated, it is final, and the courts will not interfere; but when, under the guise of remedying the grievance of a member, the central body acts in bad faith, and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent, be the subject of review.

The judgment is affirmed.

VOLUNTARY ASSOCIATIONS. — The term “voluntary association” is properly applied to an unincorporated society or body of individuals, formed for social, political, moral, religious, benevolent, protective, or mutual purposes, or to promote some public, scientific, or educational object, or to facilitate business, and not for purposes of trade or direct pecuniary profit. It has also been used to designate an incorporated as well as an unincorporated

society organized for some such end, but this use of the term is only productive of confusion. It is plain that a corporate body is entirely different from an unincorporated association, and that the rules of the law concerning the one may not necessarily apply to the other. A corporation, whatever be its object, has a definite legal *status*, and is subject to the control of the courts; while an unincorporated association has an ill-defined position in the law. It is proposed to discuss the legal nature of these voluntary associations, and the jurisdiction of the courts over them, with the exception of religious societies, which occupy a peculiar place in the American law.

LEGAL NATURE OF VOLUNTARY ASSOCIATIONS. — It has been sometimes claimed that a voluntary association, as above defined, is a partnership; but as it is not formed for the purposes of trade or business gain, and as there is therefore no participation in profit or loss, it is evident that the fundamental idea of a partnership *inter sese* is wanting. Nor as to third persons can the association be claimed to be a partnership, for it does not hold itself out to the world as such. Again, as will be subsequently shown, no member as such has any authority to bind other members by contracts which he may enter into for the benefit of the association, nor to bind or assign the common property; nor is any dissolution of the association wrought by the death of a member. On principle, then, a voluntary association whose objects are not trade or business profit is not a partnership, either as among the members themselves or as to third persons.

The jurisdiction of courts of equity over voluntary associations cannot, therefore, be sustained on the ground of partnership: *Burke v. Roper*, 79 Ala. 138; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr., N. S., 162; *Brown v. Stoerckel*, Sup. Ct. Mich., Feb. 1889; and consequently a court of equity is not authorized to decree a dissolution of an association, and a distribution of its funds among its members, because of the unauthorized expulsion by the association of a member, or because of ordinary dissensions among the members, although some other redress may be afforded a member who has been illegally expelled: *Burke v. Roper*, *supra*; *Lafond v. Deems*, 81 N. Y. 507; 8 Abb. N. C. 344; *Fischer v. Raab*, 57 How. Pr. 87, 94; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. 98; *contra*, *Gorman v. Russell*, 14 Cal. 531; 18 Id. 688. But while a voluntary association is not a partnership, it has been held that the rights of the members in the property of the association, and the modes of enforcing them, are not substantially different from those of partners in the partnership property: *McMahon v. Rauhr*, 47 N. Y. 67, 70; *Belton v. Hatch*, 109 Id. 593; 4 Am. St. Rep. 495; and see *Babb v. Reed*, 5 Rawle, 151; 28 Am. Dec. 600; *Protchett v. Schaefer*, 11 Phila. 166; *Beaumont v. Meredith*, 3 Ves. & B. 180; which latter cases proceed upon the mistaken notion that the association is a partnership. On the same principle, some of the members of an association cannot maintain an action at law, in behalf of the association, against another member upon a contract made by the latter with the association: *McMahon v. Rauhr*, *supra*; and see *Cheeny v. Clark*, 3 Vt. 431; 23 Am. Dec. 219; the proceeding must be in equity; but one member is not precluded from maintaining an action at law against the committee who ordered certain work to be done by him for the association: *Caldicott v. Griffiths*, 8 Ex. 898; 22 Eng. L. & Eq. 527.

There is no community of interest for business purposes among the members of a voluntary association; and therefore no member as such is liable for debts or other obligations incurred by any other member, or by an officer or committee of the association: 1 Bates on Partnership, sec. 75; 1 Collyer on Partnership, Wood's 6th ed., sec. 29; 1 Lindley on Partnership, *50; Par-

sons on Partnership, *42, and note; Wharton on Agency, sec. 461; *Fleming v. Hector*, 2 Mees. & W. 172; *In re St. James's Club*, 2 De Gex, M. & G. 383, 387; 16 Jur. 1075, 1076; 13 Eng. L. & Eq. 589, 592; *Volger v. Ray*, 131 Mass. 439; *Burt v. Latthrop*, 52 Mich. 106; *Sizer v. Daniels*, 66 Barb. 426; *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818; *contra*, *Park v. Spaulding*, 10 Hun, 128; although the officers or members of a committee who concur in ordering goods, or who enter into contracts generally for the benefit of the association, are personally liable: *Cullen v. Duke of Queensbury*, 1 Bro. Ch. 101; *Cross v. Williams*, 7 Hurl. & N. 675; *Caldicott v. Griffiths*, 8 Ex. 898; 22 Eng. L. & Eq. 527; *Eichbaum v. Irons*, 6 Watts & S. 67; *Lewis v. Tilton*, 64 Iowa, 220; 52 Am. Rep. 436; but mere membership of a committee of a club is not sufficient to impose upon the individual members of the committee a liability for the price of goods ordered through one of the members of the committee; it must be shown, to fix any individual member of the committee with responsibility, that the contract was made with his concurrence, or perhaps that the members of the committee are authorized to pledge one another's credit: *Todd v. Emly*, 8 Mees. & W. 505; and "it is safer to say that members of such a committee are not in such cases responsible, unless credit is given them personally": Wharton on Agency, sec. 507. Any member of the association, however, may become liable on such a contract or indebtedness if he previously assents to or subsequently ratifies the same: 1 Bates on Partnership, sec. 75; 1 Collyer on Partnership, Wood's 6th ed., sec. 29; Wharton on Agency, sec. 461; *Delauney v. Strickland*, 2 Stark. 416; *Burks v. Smith*, 7 Bing. 705; *Cockerell v. Aucompte*, 2 Com. B., N. S., 440; *Lewis v. Tilton*, 64 Iowa, 220; 52 Am. Rep. 436; *Ray v. Powers*, 134 Mass. 22; *Ferris v. Thaw*, 5 Mo. App. 279, affirmed in 72 Mo. 446; *Richmond v. Judy*, 6 Mo. App. 465, 467; *Ridgley v. Dobson*, 3 Watts & S. 118; *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818; *Fredendall v. Taylor*, 26 Wis. 286. In other words, the question is one of agency, and not of partnership, and the agency must be established by him who relies upon it, and will not be inferred from the mere fact of membership in the association: See Niblack on Mutual Benefit Societies, secs. 100-106. A course of dealing may, however, amount to proof of original authority: *Richmond v. Judy*, *supra*; and it has been suggested that there may be cases in which the act done is so clearly in furtherance of the objects for which the association was organized that all the members will be presumptively bound by it: *Sizer v. Daniels*, 66 Barb. 426. Of course where one's name is signed to the articles of an association without his authority, he does not incur any liability thereby as a member of the association: *Boyd v. Merrill*, 52 Ill. 151.

A voluntary society plainly cannot sue in a corporate character: *Lloyd v. Loaring*, 6 Ves. 773; *Pipe v. Bateman*, 1 Iowa, 369 (the case of an unincorporated association organized for pecuniary profit); unless some statute authorized the society to do so. The same would be true where it is sought to enforce a liability against the members of the society. But the members may be entitled, as individuals having a common interest, to sue to protect the funds of the association: *Mears v. Moulton*, 30 Md. 142; and the rule requiring all persons materially interested to be parties may be dispensed with in equity, when it is impracticable or very inconvenient to join them all: *Lloyd v. Loaring*, 6 Ves. 773; *Gorman v. Russell*, 14 Cal. 531.

JURISDICTION IN GENERAL OF COURTS OVER VOLUNTARY ASSOCIATIONS. — It would seem that the only court which has jurisdiction to settle differences among the members of a voluntary association, so far as jurisdiction may exist at all, is, at least in the very great majority of cases, a court of

equity. This would seem to be true, not because there is any partnership relation existing among the members (see *Burke v. Roper*, 79 Ala. 138; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr., N. S., 162), but because a court of law would usually be unable to either furnish any remedy at all, or at best a very inadequate one. Even the courts of equity have shown great reluctance in "sitting upon the concerns" of these associations: See note to *Austin v. Searing*, 69 Am. Dec. 671; and are disposed to leave the disputes to be settled within the bodies themselves. A court will not interfere in case of a partnership merely because the partners do not agree, and there is certainly greater reason why it should not interfere in case of a voluntary association concerning merely internal regulation and discipline: 2 Lindley on Partnership, *466.

The foundation of the jurisdiction of a court of equity over voluntary associations, so far as the same exists, seems to be based upon the protection of the right of property of members. Even in case of the improper expulsion of a member, the jurisdiction of a court of equity to interfere is not because he is deprived of his membership, but because of the right of property of which he is deprived; and it follows that if there is no right of property affected, a member has no standing in court. These views are well expressed by Sir George Jessel, M. R., in *Rigby v. Connol*, L. R. 14 Ch. D. 482, 49 L. J. Ch. 328, 42 L. T. 139, 28 Week. Rep. 650: "The first question that I will consider is, What is the jurisdiction of a court of equity as regards interfering, at the instance of a member of a society, to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the queen's courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each others' houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each others' houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice could interfere with such an association, if some of the members declined to associate with some of the others"; and see also *Sale v. First Regular Baptist Church*, 62 Iowa, 26; 49 Am. Rep. 136. And in *Burke v. Roper*, 79 Ala. 138, it was held that the jurisdiction of a court of equity over a voluntary association, organized for charitable or benevolent purposes, was grounded in the trust nature of the funds of the association, their charitable use, and the inadequacy of the legal remedies.

Individuals who form themselves into a voluntary association may agree to be governed by such rules as they see fit to adopt, so long as they are not immoral, contrary to public policy, or in contravention of the law of the land: Note to *Austin v. Searing*, 69 Am. Dec. 672; *White v. Brownell*, 2 Daly, 329, 359; 4 Abb. Pr., N. S., 162, 193; *Hyde v. Woods*, 2 Saw. 655, 659. A member, therefore, is bound by all such rules to which he has assented, found in the constitution or by-laws of the association, and his duties, rights, and privileges as a member are measured by them: *Hyde v. Woods*, 2 Saw. 655, 659,

affirmed in 94 U. S. 523; *Belton v. Hatch*, 109 N. Y. 593; 4 Am. St. Rep. 495; *White v. Brownell*, *supra*; *Fischer v. Raab*, 57 How. Pr. 87, 95; *Fitz v. Muck*, 62 Id. 69, 74; *Elsas v. Alford*, 1 City Ct. Rep. 123; *Leech v. Harris*, 2 Brewst. 571; *Mozey's Appeal*, 9 Week. Not. Cas. 441. It results that a member cannot complain of a decision by the association, or by a tribunal provided for by its laws, suspending or expelling him, or denying his claim to benefits or property, nor have the courts jurisdiction to interfere, where the association or tribunal has acted under its rules, unless it appears either that the rules themselves were invalid, or that the decision was not in good faith, or was made without notice and an opportunity to be heard: *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; 37 L. J. Ch. 173; 16 Week. Rep. 266; *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615; 44 L. T. 557; 29 Week. Rep. 511; *Richardson-Gardner v. Fremantle*, 24 L. T. 81; 19 Week. Rep. 256; *Lytleton v. Blackburn*, 33 L. T. 641; 45 L. J. Ch. 219; *Lambert v. Addison*, 46 L. T. 20; *Robinson v. Yates City Lodge*, 86 Ill. 598, 599; *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass. 368, 372; *Burt v. Grand Lodge F. & A. M.*, 44 Mich. 208; *People ex rel. Corrigan v. Young Men's Father Matthew Ben. Soc.*, 65 Barb. 357; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr., N. S., 162; *Olery v. Brown*, 51 How. Pr. 92; *Fitz v. Muck*, 62 Id. 69; *Sperry's Appeal*, 116 Pa. St. 391; *Leech v. Harris*, 2 Brewst. 571. In other words, the courts have jurisdiction to interfere against the decision of the members of an association, or of a tribunal provided for by them, professing to act under their rules, only when it can be shown that the rules were immoral, contrary to public policy, or in contravention of the law of the land, that the rules were not observed, that there was *mala fides* or malice in arriving at the decision, or that the decision was made without notice and an opportunity to be heard. Otherwise, the decision is conclusive. The courts will not inquire into its merits. In *Dawkins v. Antrobus*, *supra*, Brett, L. J., said: "I think we ought to take great care that this court does not, by successive decisions, usurp an authority in these cases for which there is no color in point of law. In my opinion, there is some danger that the courts will undertake to act as courts of appeal against the decisions of members of clubs, whereas the court has no right or authority whatever to sit in appeal upon them at all. The only question which a court can properly consider is, whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions which a court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club, — in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of these charges can be made out by those who come before the court, the court has no power to interfere with what has been done. It seems to me the only question in the present case is upon the last matter, viz., whether what has been done is *bona fide*. The court has no right, in my opinion, to consider whether what was done was right or not, or, even as a substantive question, whether what was decided was reasonable or not. The only question is, whether it was done *bona fide*."

It will be seen from the foregoing that the jurisdiction of the courts over voluntary associations falls much short of that possessed over incorporated bodies. Thus in the note to *Hiss v. Bartlett*, 63 Am. Dec. 776, in speaking

of the expulsion of members, it is said: "A clear distinction is recognized between the power of corporations and that of non-incorporated societies to expel members. Where a corporation expels a member, whether by virtue of express power under its charter, in pursuance of its by-laws, or through the inherent power attaching to it, the courts will, at the instance of the expelled member, investigate the action of the corporation, determine whether it acted in accordance with its power, whether the by-laws were legal and reasonable, whether the expulsion was fair and just, and whether the cause of expulsion was such as would produce an injury to the corporation. But in the case of expulsion by an unincorporated society, courts will not interfere with the decision of members of the society where they profess to act under their rules, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been *mala fides* or malice in arriving at the decision." The members of a voluntary association are bound by the rules which they have adopted, if they are not contrary to the municipal law, whether they be reasonable or not. The courts have no visitatorial powers over the rules of a voluntary association as they have over those of a corporation, and cannot determine whether they are reasonable or unreasonable: Note to *Austin v. Searing*, 69 Am. Dec. 672; Hirschl on Fraternities, 63; Niblack on Mutual Benefit Societies, sec. 25; *Kehlenbeck v. Logeman*, 10 Daly, 447, 448; *Elsas v. Alford*, 1 City Ct. Rep. 123. But the rules must conform to the laws of the land. Therefore, where a member refuses to submit to the ceremony of expulsion established by the association, which involves a battery, it cannot lawfully be inflicted: *State v. Williams*, 75 N. C. 134. It is necessary, furthermore, that a member should have assented to the rules of the association before he will be bound thereby: *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665, and note 673; *Leech v. Harris*, 2 Brewst. 571; but when a member joins an association, he is presumed to know and to assent to its rules: Note to *Austin v. Searing*, *supra*; 2 Daly, 329; 4 Abb. Pr., N. S., 162; and a member may be bound by amendments to and changes of the rules subsequently made in accordance with existing rules: Note to *Austin v. Searing*, 69 Am. Dec. 674; *Poultney v. Bachman*, 31 Hun, 49.

Again, it is a well-settled rule that the courts will not interfere at the instance of an aggrieved member of an association until he has exhausted all the remedies afforded him by the constitution or by-laws of the association, or shows a good excuse for not having done so: Niblack on Mutual Benefit Societies, secs. 130, 131; *Chamberlain v. Lincoln*, 129 Mass. 70; *Karcher v. Supreme Lodge Knights of Honor*, 137 Id. 368, 372; *Oliver v. Hopkins*, 144 Id. 175; *Lafond v. Deems*, 81 N. Y. 507; 8 Abb. N. C. 344; *White v. Brownell*, 2 Daly, 329, 365; 4 Abb. Pr., N. S., 162, 199; *Poultney v. Bachman*, 31 Hun, 49; *McAlees v. Supreme Sitting Order of Iron Hall*, Sup. Ct. Pa., April, 1888; and see *McCallion v. Hibernia Sav. & L. Soc.*, 70 Cal. 163. "Courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations, so long as the government is fairly and honestly administered, and those who have grievances should be required in the first instance to resort to the remedies for redress provided by the rules and regulations": *Lafond v. Deems*, 81 N. Y. 507, 514; 8 Abb. N. C. 344, 349, per Miller, J. This rule is not affected by the discontinuance of an appellate power within the association, which had once existed, when it does not appear that any appeal would have been necessary if charges had been presented: *Lafond v. Deems*, *supra*; but where a resolution expelling a member of a club was adopted at a meeting of the governing committee thereof, which consisted

of twenty members, eighteen of whom were present, and fourteen of whom voted for the adoption of the resolution, it was held that the probability that favorable action might be secured by such expelled member by an application to the same committee to have the resolution reconsidered and revoked, which could have been made under the rules of the club, was so extremely remote as to relieve him from the necessity of applying for a reconsideration before resorting to a judicial proceeding: *Loubat v. Le Roy*, 40 Hun, 546, reversing 15 Abb. N. C. 1.

The admission of an individual into a voluntary association is a matter which plainly rests exclusively with its members. The courts cannot compel his admission; and if he applies for admission, and is excluded, he is entirely without any legal remedy, no matter how arbitrary or unjust may be his exclusion: Niblack on Mutual Benefit Societies, sec. 30.

JURISDICTION OF COURTS TO INTERFERE CONCERNING EXPULSION OF MEMBERS OF VOLUNTARY ASSOCIATIONS. — The power of unincorporated societies to expel members, and the jurisdiction of courts to interfere concerning expulsions, will be found considered in the notes to *Hiss v. Bartlett*, 63 Am. Dec. 776, and *Austin v. Searing*, 69 Id. 677. It has been shown above that the foundation of the jurisdiction of a court of equity in such a case is the right of property of which a member is deprived by the expulsion, and that if there is no right of property affected, a court of equity can grant him no relief: *Rigby v. Connol*, L. R. 14 Ch. D. 482; 49 L. J. Ch. 328; 42 L. T. 139; 28 Week. Rep. 650; *Sale v. First Regular Baptist Church*, 62 Iowa, 26; 49 Am. Rep. 136; and it seems to be the rule, however it may be in case of expulsions from incorporated bodies, that the only remedy for the unauthorized expulsion of a member of an unincorporated or voluntary association proper is in equity, either to restrain a threatened expulsion, or to restrain the officers or members from excluding the expelled member, and from interfering with his enjoyment of the privileges of the association; *mandamus* is not a proper remedy: See Niblack on Mutual Benefit Societies, sec. 63; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. 98; *Fitz v. Muck*, 62 How. Pr. 69, 73-75; *Leech v. Harris*, 2 Brewst. 571; nor in equity is there a remedy by dissolution of the association: *Burke v. Roper*, 79 Ala. 138; *Thomas v. Ellmaker*, *supra*; *Fischer v. Raab*, 57 How. Pr. 87, 94. The case of *Gorman v. Russell*, 14 Cal. 531, 18 Id. 688, to the contrary, is opposed to principle and authority.

Whether, in the absence of any provision in the constitution or by-laws of a voluntary association, giving the members the power of expulsion, there is any inherent power in the majority to expel a member, is a question that does not seem to have been directly decided. Jessel, M. R., in *Darwins v. Antrobus*, L. R. 17 Ch. D. 615, 620, was of the opinion that there was not; and Mr. Niblack adopts this view: Niblack on Mutual Benefit Societies, secs. 55-57; and see *Innes v. Wylie*, 1 Car. & K. 257; but the *dicta* of the American cases is in favor of the power: The principal case; *Leech v. Harris*, 2 Brewst. 571; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr., N. S., 162; but see *District Grand Lodge v. Cohn*, 20 Ill. App. 335. But where the constitution or by-laws of a voluntary association provide for the expulsion, as stated above, a court will not interfere unless it appears that the rules were immoral, contrary to public policy, or in contravention of the law of the land, that the rules were not observed, that there was *mala fides* or malice in arriving at the decision, or that the decision was made without notice and an opportunity to be heard: Note to *Hiss v. Bartlett*, 63 Am. Dec. 776; note to *Austin v. Searing*, 69 Id. 677; Niblack on Mutual Benefit Societies, secs. 59-62; *Hutchinson v. Marquis of Exeter*, L. R. 5 Eq. 63; 37 L. J. Ch. 173; 16

Week. Rep. 266; *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615; 44 L. T. 557; 29 Week. Rep. 511; *Richardson-Gardner v. Fremantle*, 24 L. T. 81; 19 Week. Rep. 256; *Lyttleton v. Blackburn*, 33 L. T. 641; 45 L. J. Ch. 219; *Lambert v. Addison*, 46 L. T. 20; *White v. Brownell*, 2 Daly, 329; 4 Abb. Pr., N. S., 162; *Olery v. Brown*, 51 How. Pr. 92; *People ex rel. Corrigan v. Young Men's Father Matthew Ben. Soc.*, 65 Barb. 357; *Sperry's Appeal*, 116 Pa. St. 391; *Leech v. Harris*, 2 Brewst. 571; *Burt v. Grand Lodge F. & A. M.*, 44 Mich. 208; *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass. 368, 372. The decision is conclusive, and its merits will not be inquired into. A member is entitled to an adequate notice and an opportunity of meeting the accusations against him: *Niblack on Mutual Benefit Societies*, sec. 65; *Innes v. Wylie*, 1 Car. & K. 257; *Fisher v. Keane*, L. R. 7 Ch. D. 353; 49 L. J. Ch. 11; 41 L. T. 335; *Labouchere v. Earl of Wharnccliffe*, L. R. 13 Ch. D. 346; 41 L. T. 638; 28 Week. Rep. 367; *Wachtel v. Noah Widows' and Orphans' Soc.*, 84 N. Y. 28; *Fitz v. Muck*, 62 How. Pr. 69, 74; *Downing v. St. Columba's etc. Soc.*, 10 Daly, 262; notwithstanding the rules do not expressly provide for notice. So a resolution adopted by the governing committee of a club, expelling a member, is inoperative and void, where it was made without notice to and opportunity to be heard by such member, although such committee had appointed a subcommittee to investigate and report the charges, and the member, in pursuance to a notice by the subcommittee, appeared before the latter and furnished a statement: *Loubat v. Le Roy*, 40 Hun, 546, reversing 15 Abb. N. C. 1; but under a provision of the superior body of a benevolent association guaranteeing a fair hearing to every member before expulsion, except where such member has been expelled from the subordinate lodge of which he was a member, one who is expelled from such subordinate lodge may be expelled from the superior body without notice: *Pfeiffer v. Joerges*, 13 Daly, 161. If a certain notice is prescribed by the constitution and by-laws, the expulsion is invalid, if it be not given or waived: *Washington Beneficial Soc. v. Bacher*, 20 Pa. St. 425. The notice, it seems, should be served personally, if the constitution or by-laws do not provide for a different mode of service: *Wachtel v. Noah Widows' and Orphans' Soc.*, 84 N. Y. 28. The notice may be waived; but it is held that the accused does not waive it by attending a meeting and entering on his defense: *Downing v. St. Columba's etc. Soc.*, 10 Daly, 262, — a somewhat questionable ruling. Nor, it has been held, has a society the right to expel a member merely because he does not appear, and without proving the charges against him; even if he does not appear, proof should be required of his offense: *People ex rel. Corrigan v. Young Men's Father Matthew Ben. Soc.*, 65 Barb. 357. If a member admits the offense warranting his expulsion, it is then not necessary that he should have a formal hearing and trial, because he, in effect, pleads guilty: *Moxey's Appeal*, 9 Week. Not. Cas. 441. An irregularity, under the by-laws, in the appointment of the committee to try a member, is waived by the appearance of the accused, who, having knowledge of the irregularity, does not object thereto: *Sperry's Appeal*, 116 Pa. St. 391. Where charges are preferred against a member, who is apparently of unsound mind, his failure to appear and answer is not excused by his insanity, and the association may regularly proceed, according to its laws, to convict and punish him by expulsion: *Pfeiffer v. Weishaup*, 13 Daly, 161. If the constitution or by-laws provide a remedy within the association for a suspended or expelled member, then, as already seen, he must avail himself of such remedy before he can ask the courts to interfere: *White v. Brownell*, 2 Daly, 329, 365; 4 Abb. Pr., N. S., 162, 199; *Lafond v. Deems*, 81 N. Y. 507; 8 Abb. N. C. 344; *Karcher*

v. *Supreme Lodge Knights of Honor*, 137 Mass. 368, 372; but a resort to such remedy is excused if it be clearly useless: *Loubat v. Le Roy*, 40 Hun, 546, reversing 15 Abb. N. C. 1.

JURISDICTION OF COURTS TO DIRECTLY INTERFERE TO PROTECT RIGHTS OF PROPERTY OF MEMBERS OF VOLUNTARY ASSOCIATIONS. — The question of the direct interference of the courts, to protect the rights of property of the members of a voluntary association, is far from being in a satisfactory condition. It is plain from the principles heretofore discussed that these rights may be governed by the constitution and by-laws of the association, so far as the same have been assented to, and are not contrary to the law of the land. Under such circumstances a member would have such rights, and such rights only as the constitution and by-laws might provide: *Hyde v. Woods*, 2 Saw. 658, affirmed in 94 U. S. 523; *Belton v. Hatch*, 109 N. Y. 593; 4 Am. St. Rep. 495; *Mozey's Appeal*, 9 Week. Not. Cas. 441. Thus where the constitution of a voluntary association of stock-brokers, known as the "Stock and Exchange Board," formed for the purpose of facilitating the business of brokers, provided that where a member fails to comply with his contracts, or becomes insolvent, his membership shall be forfeited, and the board may dispose of his seat and apply the proceeds to the payment of his indebtedness to other members of the board, to the exclusion of outside creditors, unless there shall be a balance after the satisfaction of the claims of the members, only the residue, if any, of the proceeds of the sale of the seat of an insolvent member, after paying the liabilities to other members, is assets of such member to which his assignee in bankruptcy is entitled: *Hyde v. Woods*, *supra*; and where the constitution of a similar association provides for a forfeiture of membership, and declares that in such event "his membership may be disposed of forthwith by the committee on admissions," a member thus expelled ceases to have any interest in the association, and the proceeds of his membership or seat upon the sale do not belong to him, but to the association, and may be disposed of as it may direct: *Belton v. Hatch*, *supra*. So the decision of the members of a beneficial society, or of a tribunal provided for by its laws, as to the claim of a member to benefits, is, within the general rule above considered, conclusive, if made in good faith: *Fitz v. Muck*, 62 How. Pr. 69; *Torrey v. Baker*, 1 Allen, 120; and see, where the society is incorporated, *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *Osceola Tribe v. Schmidt*, 57 Md. 98; and at all events he will be obliged to exhaust the remedies provided for by the constitution and by-laws of the association, before he can appeal to the courts: *Poultney v. Bachman*, 31 Hun, 49; *McAlees v. Supreme Sitting Order Iron Hall*, Sup. Ct. Pa., April, 1888; see also *Oliver v. Hopkins*, 144 Mass. 175; unless, undoubtedly, such a proceeding within the society would be clearly useless. Again, the rights of different persons claiming to represent a subordinate lodge of an order are to be determined by the constitution of the grand lodge: *Chamberlain v. Lincoln*, 129 Id. 70; and where the majority of the members of an unincorporated benevolent lodge withdrew from the jurisdiction of the grand lodge and surrendered their charter, the minority who continued steadfast in their allegiance, and to whom the charter was again delivered, are entitled to the property of the lodge: *Altmann v. Benz*, 27 N. J. Eq. 331; see also *Smith v. Smith*, 3 Desaus. 557.

A member of such a voluntary association as one formed for social purposes, or the facilitation of business, has undoubtedly an interest in the general assets of the association so long as he remains a member: *In re St. James's Club*, 2 De Gex, M. & G. 383, 387; 16 Jur. 1075, 1076; 13 Eng. L.

& Eq. 589, 592; which is *prima facie* equal or proportionate: *McMahon v. Rauhr*, 47 N. Y. 67, 70; *Belton v. Hatch*, 109 Id. 593; 4 Am. St. Rep. 495; but in the absence of any rule to the contrary, he has no severable or transmissible interest, or the right to any proportion of the assets upon ceasing to be a member, although upon dissolution a member would be entitled to share in the effects: *In re St. James's Club*, *McMahon v. Rauhr*, *Belton v. Hatch*, *supra*; *White v. Brownell*, 2 Daly, 329, 356; 4 Abb. Pr., N. S., 162, 191; and where, in a certain event, all moneys contributed, less expenses, were, by the constitution and a resolution of the members of an association, to be returned to the members, on the happening of such event, an action for money had and received may be maintained by a member to recover the amount of his contribution against the treasurer of the association who had possession of the funds: *Kochler v. Brown*, 2 Daly, 78. So upon the enforced sale of land belonging to a voluntary society, with no rules or provisions as to the disposition of its property, it was held that the members of the society for the time being were entitled to divide the proceeds in equal shares: *Brown v. Dale*, L. R. 9 Ch. D. 78; 78 Week. Rep. 149. But it was held in *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392, that funds of a voluntary association, accumulated under a by-law which provided that they should be used "for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans," were in the hands of the acting members for a charitable use, and could not, on the dissolution of the lodge, be divided among themselves for their private use; but compare *Burke v. Roper*, 79 Ala. 138.

The members of a voluntary association have the right to manage, control, and dispose of the property of the association; but this power, at least against a dissenting minority, must be exercised subject to the provisions of the constitution and by-laws: *Torrey v. Baker*, 1 Allen, 120, 122; and where the constitution and by-laws of an association gave the control of its funds to members in good standing, and all of such members joined in an assignment of the funds to the plaintiff, the plaintiff is entitled to recover them: *Brown v. Stoerkel*, Sup. Ct. Mich., Feb. 1889. A majority of the members of an association, having no constitution and by-laws, present at any regular meeting of the association, may dispose of its funds for any purpose within its objects, but cannot devote them to a purpose foreign thereto as against any member who does not consent: *Abels v. McKeen*, 18 N. J. Eq. 462. A diversion of the funds from the objects designed, without the consent of the contributors, will be restrained: *Penfield v. Skinner*, 11 Vt. 296; *Morton v. Smith*, 5 Bush, 467.

Although a voluntary association cannot sue in a corporate capacity, the members are entitled, as individuals having a common interest, to sue to protect the funds or property of the association: *Lloyd v. Loaring*, 6 Ves. 773; *Mears v. Moulton*, 30 Md. 142. In the early case of *Beaumont v. Meredith*, 3 Ves. & B. 180, an unincorporated society, organized for the relief of its members in case of sickness, was considered in the nature of a partnership for the purpose of making some of the members account for the proceeds of property of the association sold by them without authority. The action could undoubtedly have been maintained without resting it upon the erroneous theory of a partnership. In *Penfield v. Skinner*, 11 Vt. 296, the treasurer of a voluntary association for charitable purposes was decreed to account for the funds of the association in his hands, and to pay them over to those entitled to receive them. So a bill may be maintained by the members of a voluntary association, for themselves and other members to

compel a trustee, who refused to join with his co-trustees in an assignment to their successors of funds of the association on deposit in a savings bank, to join in such assignment: *Birmingham v. Gallagher*, 112 Mass. 190. The members of an association formed for a legal purpose can maintain an action to recover money belonging to the association, although in attempting to carry out such purpose they have been guilty of illegal acts: *Snow v. Wheeler*, 113 Id. 179.

JURISDICTION OF COURTS TO DISSOLVE VOLUNTARY ASSOCIATIONS. — It has been held that where the operations of a voluntary association have been discontinued, its objects and purposes being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute its funds among the several contributors in proportion to the amount contributed or paid by them respectively: *Burke v. Roper*, 79 Ala. 138. But otherwise it should not be dissolved for slight causes, but only when the organization has ceased to answer the ends of its existence, and no other mode of relief is attainable: *Lafond v. Deems*, 81 N. Y. 507; 8 Abb. N. C. 344. Certainly, an association will not be dissolved because of mere differences of opinion and ordinary disputes among the members, although it might in case of violent dissensions and irreconcilable differences: *Fischer v. Raab*, 57 How. Pr. 87, 94; *Lafond v. Deems*, *supra*; Niblack on Mutual Benefit Societies, secs. 138-141; nor, as has been shown, is the unauthorized expulsion of a member a ground for dissolution: *Burke v. Roper*, 79 Ala. 138; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. 98; *Fischer v. Raab*, *supra*; *contra*, *Gorman v. Russell*, 14 Cal. 531; 18 Id. 688.

BAUGHMAN v. REED.

[75 CALIFORNIA, 319.]

LESSOR BECOMES TENANT IN COMMON WITH LESSEE OF CROPS GROWN ON LEASED PREMISES, where a lease of agricultural lands provides that the lessor shall receive a certain proportion of the crops grown on the leased premises after the same are harvested.

TENANT IN COMMON OF CROP MAY MAINTAIN ACTION FOR PARTITION THEREOF, and the appointment of a receiver pending the action, where his co-tenant is in the sole possession of the crop, denies his right to any part of the same, and threatens to sell it and appropriate the proceeds to his own use.

ACTION for partition of personal property. The opinion states the facts.

Lindley and Spagnoli, and Ruddick and Solinsky, for the appellant.

Blanchard and Swisler, and Eagon and Rust, for the respondent.

BELCHER, C. C. The court below sustained a general demurrer to the complaint, and plaintiff declining to amend, judgment was entered in favor of the defendant, from which the plaintiff has appealed.

The material facts stated in the complaint are as follows:—

In October, 1882, the plaintiff executed to the defendant a written lease, for the term of five years then next ensuing, of a certain ranch in Amador County, and also of certain farming utensils and stock. The plaintiff was to erect certain improvements on the premises, and to furnish to the defendant the seed needed to put in a crop the first year. The defendant was to till and in all respects cultivate the premises in a husband-like manner, and out of the crop raised the last year was to return to the plaintiff the same number of pounds of seed, and of the same kinds, as he received the first year. The defendant was also to deliver to the plaintiff, or his order, "two fifths of all the crops produced on the said farm and premises aforesaid, of every name and description or kind, to be divided on the place; hay in bale under shelter, grain of all kinds in the granary, apples, peaches, pears, plums, etc., in the fruit-house, grapes in the vineyard after being gathered, and in a reasonable time after such crops shall have been harvested or gathered." The defendant entered under his lease, and continued to occupy and cultivate the premises until the 26th of July, 1886, when this action was brought.

It is further alleged that plaintiff, in October, 1882, furnished to defendant, to be used as seed, 32,469 pounds of barley, and 3,700 pounds of wheat; that during the year 1886 defendant had raised on the premises 37 tons of barley of the value of \$1,000, and 45 tons of wheat of the value of \$1,350, and that all of this grain was severed from the ground and in process of being thrashed and sacked; that defendant intended and had threatened to and would leave and abandon the premises on completing the harvesting of the crop, and that he denied the right of the plaintiff to any part thereof, and threatened and intended to remove the whole crop, and to dispose of and convert the same to his own use; that defendant is insolvent.

The prayer is that 32,469 pounds of the barley, 3,700 pounds of the wheat, and two fifths of the remainder of the crop, be segregated and set apart to the plaintiff, and that a receiver be appointed pending the action, and for general relief.

We fail to see why the complaint does not state facts sufficient to constitute a cause of action.

The action was in effect for a partition of personal property, owned by the parties as tenants in common. Now, conceding that plaintiff did not own that part of the crop which he

claimed in return for the seed furnished in 1882 (*Callender v. McLeod*, 74 Cal. 376), still he unquestionably did own, as tenant in common with the defendant, two fifths of all the wheat and barley raised on the leased premises: *Bernal v. Hovious*, 17 Id. 542; 79 Am. Dec. 147; *Knox v. Marshall*, 19 Cal. 617; Freeman on Cotenancy and Partition, sec. 100. The defendant was in possession of the whole crop, and was threatening to sell it and appropriate the proceeds to his own use. In such a case an action for partition was the proper remedy, and the appointment of a receiver was authorized by the code: Freeman on Cotenancy and Partition, secs. 426, 448; Code Civ. Proc., sec. 564.

It is urged for respondent that the complaint was insufficient, because it failed to allege that plaintiff had performed all the conditions of the lease which were to be performed by him, but we think sufficient facts were stated in this regard.

It is further urged that the action was commenced prematurely, because the defendant was to deliver to plaintiff his share of the grain in the granary. But as the defendant denied the plaintiff's right to any part of the crop, and was threatening to appropriate it all to his own use, we do not see why plaintiff was called upon to delay the commencement of an action to determine his rights.

The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

HAYNE, C., and FOOTE, C., concurred.

The COURT. For reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with directions to overrule the demurrer.

RIGHT OF ACTION BY ONE TENANT IN COMMON OF CROP, for conversion by other co-tenants: *Delaney v. Root*, 99 Mass. 546; 97 Am. Dec. 52, and note 56.

UNDER LEASE OF FARM FOR YEARS, RENT PAYABLE IN PORTION OF CROPS, the title to the crops until delivery is in the tenant, and he may maintain an action for trespass thereto against the landlord's grantee of the land: *Chicago etc. R. R. Co. v. Linard*, 94 Ind. 319; 48 Am. Rep. 155.

EXCLUSIVE USE OF COMMON PROPERTY BY ONE TENANT IN COMMON does not create the relation of landlord and tenant between him and his co-tenant, nor render him liable to co-tenant for rents, whether property be realty or chattel: *Hamby v. Wall*, 48 Ark. 218.

[IN BANK.]

STOCKTON BUILDING AND LOAN ASSOCIATION v.
CHALMERS.

[75 CALIFORNIA, 332.]

JUDGMENT OF FORECLOSURE AGAINST SURVIVING WIFE SUEDE SOLELY AS EXECUTRIX OF HER DECEASED HUSBAND DOES NOT AFFECT HER INDIVIDUAL RIGHTS in the mortgaged premises as a homestead, notwithstanding she sets up in her answer the fact of her declaration of homestead on the property.

APPEAL from an order refusing a writ of assistance. The opinion states the facts.

W. L. Dudley and George G. Blanchard, for the appellant.

Charles N. Fox, for the respondent.

SEARLS, C. J. This is an appeal from an order after final judgment refusing a writ of assistance.

Robert Chalmers, in his lifetime, executed a mortgage upon certain premises in El Dorado County; subsequently his wife, Louisa, declared a homestead upon a portion of the same premises.

Chalmers departed this life, and an action to foreclose the mortgage was brought against the executor and executrix of his last will, viz., against George Chalmers and Louisa M. Chalmers, as executor and executrix thereof.

Louisa Chalmers, the widow, was made a party defendant as executrix, but not in her individual capacity.

The executor and executrix set up the fact of the declaration of homestead by the latter, and the court found the existence of the homestead as a fact, and that it was subsequent in time and subject to the lien of the mortgage.

A decree was entered in favor of plaintiff, under which the property was sold, purchased by plaintiff, and a sheriff's deed having passed, possession was demanded of Louisa M. Chalmers (who had before that time intermarried with one Hardie) pursuant to a clause in the decree requiring possession to be delivered to the purchaser, which was refused, whereupon plaintiff applied for a writ of assistance.

The court below denied the writ upon the grounds that Mrs. Chalmers was not individually a party to the foreclosure suit, and was not made such, or concluded by the answer made in her representative capacity, setting up the homestead, or by the decree rendered therein.

It is well settled that a judgment for or against a party in one right cannot affect him when acting in another right. Thus a plaintiff suing as administrator of his wife is not affected by a judgment against himself, in her lifetime, in an action to which she was not a party: *Blakey v. Newby's Adm'rs*, 6 Munf. 64. "A decree against one as administrator, on a bill to compel the delivery of slaves claimed as a gift from the intestate, will not conclude his rights as a creditor, on a bill by him against the former plaintiffs to set aside the gift conveyance for fraud": Freeman on Judgments, sec. 156, and cases cited.

Louisa Chalmers was sued as the executrix of the last will of her deceased husband; as such she could only avail herself of such defenses to the foreclosure suit as would have existed in favor of her testator had he been living and a party to the action; and had he been living and a party defendant, he could not have concluded by a defense, or want thereof, his wife's right to the homestead. Such result could only be reached, if by action, in a proceeding to which she was a party: *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 308; *Kraemer v. Revalk*, 8 Cal. 75; *Van Reynegan v. Revalk*, 8 Id. 76; *Cook v. Klink*, 8 Id. 347; *Stoops v. Woods*, 45 Id. 439.

It is true, a party may be before the court in two or more capacities; and in *Corcoran v. Chesapeake etc. Canal Co.*, 94 U. S. 741, an individual, as trustee for certain bond-holders, was brought before the court, and a decree rendered against him as such, and it was held he could not relitigate the same matter on the ground that he was himself a bond-holder of some of the bonds. If he was such holder, it was said he was bound by the former decree, because as trustee in the former suit he was representing himself. That, however, is not this case. Louisa Chalmers, as executrix, represented the estate of her deceased husband, and the decree rendered is binding upon such estate; but her right in the homestead, if taken from the community property of herself and husband, vested absolutely in her upon the death of the latter, and as executrix she could not represent it.

But it is claimed that defendant did, in effect, make herself individually a party to the action, by setting up the homestead right when sued as executrix.

The code specifies but two methods by which, after the commencement of an action, new parties may be brought in; one is by an order of the court and the other by complaint of

intervention. No such order was made or proceedings had in this case; hence we conclude she was not individually a party to the cause.

It may well be that a party who voluntarily files an answer in a cause without an order of court making him a party defendant, and who goes to trial upon the issues made by his answer to the complaint, will be concluded by the judgment rendered on the trial of such issues, and estopped from denying that he was a party to the action. But in the present case we search the decree in vain for any adjudication of defendant's homestead rights.

The conclusion reached by the court below was "that Mrs. Chalmers, now Mrs. Hardie, never was a party to this action, and therefore the judgment and decree do not affect her homestead right, and being in possession under the homestead right, she is rightfully in possession."

We are of opinion this conclusion was warranted by the premises, and the order denying the writ is affirmed.

PATERSON, J., dissented. He urged that though Mrs. Chalmers was not, technically speaking, a party to the former action, yet she voluntarily appeared therein and presented her homestead rights to the consideration of the court; that the issue voluntarily interposed by her was, by the parties and by the court, treated as properly in the cause, and was, in fact, litigated and determined; and that, as she thus became, in effect, a litigant in her individual capacity, she was upon principle as much bound in that capacity by the final result as if her name "had been repeated in the title of the cause without the addition of the official designation 'executrix.'"

MORTGAGE OF HOMESTEAD—EFFECT OF FORECLOSURE DECREE: See *Larson v. Reynolds*, 13 Iowa, 579; 81 Am. Dec. 444; *Hoskins v. Litchfield*, 31 Ill. 137; 83 Am. Dec. 215; *Burnap v. Cook*, 16 Iowa, 149; 85 Am. Dec. 507; *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304.

JUDGMENT FOR OR AGAINST PERSON IN ONE CAPACITY is not a bar to a suit by or against him in another capacity, as a general rule: Freeman on Judgments, sec. 156; Bigelow on Estoppel, 4th ed., 123; 1 Herman on Estoppel, sec. 94; 2 Smith's Lead. Cas., 8th Am. ed., *816; *Robinson's Case*, 5 Coke, 32 b. Thus a judgment against a person sued in his individual capacity is not a bar to an action brought by him in the capacity of administrator against the plaintiff in the former action: *Blakey v. Newby's Adm'rs*, 6 Munf. 64; *Lander v. Arno*, 65 Me. 26; nor to an action brought by him in the capacity of trustee: *Rathbone v. Hooney*, 58 N. Y. 463; nor will a decree against one as administrator, on a bill to compel the delivery of slaves claimed as a gift from the intestate, conclude his rights as a creditor, on a bill by him against the former plaintiffs to set aside the conveyance for fraud: *Jones v. Blake*, 2 Hill Ch. 629; and where a vendor of real estate is an heir at law of the deceased vendee, and as such heir, and in no other capacity, is made a party to the petition of such decedent's administrator for an order to sell the real estate, the adjudication upon such petition will not estop the vendor, as a creditor of the decedent, from maintaining a suit for the enforcement of his

vendor's lien: *Lord v. Wilcox*, 99 Ind. 491. Again, a judgment for the defendant, in an action to recover land, brought by the plaintiff in his own right, does not bar another action for the same land brought by him in his capacity as guardian: *Marshall v. Rough's Heirs*, 2 Bibb, 628; nor an action brought by him in the right of another: *Brooking v. Dearmond*, 27 Ga. 58; so a suit in the name of the president of the orphans' court, for the use of the assignee of the husband, for the amount of the share of the wife under a recognizance executed by the administrator of the father's estate, is not a bar to a recovery in the name of the same officer, for the use of the wife and her husband, as her trustee: *Eshelman v. Shuman's Adm'rs*, 13 Pa. St. 560; nor is a judgment in an action brought by an administratrix under Lord Campbell's act an estoppel in a suit brought by the administratrix suing for damages to the personal estate: *Leggott v. Great Northern R'y*, L. R. 1 Q. B. Div. 599; nor is a judgment in a suit brought by the executor of a deceased partner against the defendant, in his capacity as liquidator of the firm, a bar to another suit brought by the executor against the defendant in his capacity of partner: *Slocomb v. De Lizardi*, 21 La. Ann. 355; 99 Am. Dec. 740. An extreme case is that of *Landon v. Townshend*, 112 N. Y. 93; 8 Am. St. Rep. It was there held, that though an assignee in bankruptcy was made a defendant in a suit to foreclose a mortgage executed by the bankrupt, and made default therein, and the default was followed by a judgment, sale, and conveyance, the whole proceeding was ineffectual, because the complaint did not state, in express terms, that the defendant was sued in his capacity of assignee. But if a person sued in one capacity litigates in that suit his rights in another capacity, he will be concluded by the judgment therein. Thus where an executrix, who was also the widow of the testator, was sued in the former capacity only, but raised in her defense of the suit the issue of her rights as usufructuary, she will be personally concluded by the judgment, and cannot subsequently attack its validity on the ground that she was not cited in her individual capacity: *Denegre v. Denegre*, 33 La. Ann. 689. The resemblance of this latter case to the principal case will be remarked. It was largely relied upon by Mr. Justice Paterson in his dissenting opinion, and seems to us to establish an eminently proper doctrine. A person may otherwise be before the court in two capacities, and the judgment may bind him in both. Thus one who is brought before the court as the trustee of certain bond-holders, and, as such, a decree is entered against him, cannot relitigate the same matter on the ground that he was himself a holder of some of the bonds, because as trustee in the former suit he was also representing himself: *Corcoran v. Chesapeake etc. Canal Co.*, 94 U. S. 741.

FRICK v. SINON.

[75 CALIFORNIA, 337.]

ONE IN ADVERSE POSSESSION OF LAND DOES NOT BECOME CO-TENANT with the remaining tenants in common by taking a deed of the entire tract from one of the co-tenants, by whom the outstanding title was held, and continuing in possession under it.

TITLE ONCE ACQUIRED BY ADVERSE POSSESSION IS NOT AFFECTED by a subsequent offer by the adverse possessor to buy the outstanding title.

EVIDENCE OF PAYMENT BY PLAINTIFF OF STREET ASSESSMENTS AND INSURANCE ON PREMISES IS ADMISSIBLE in an action to quiet title by the adverse possessor against the holder of the outstanding title, to show that the plaintiff's claim was to the whole title.

ACTION to quiet title. The facts are stated in the opinion.

William M. Pierson, for the appellant.

J. E. Foulds, for the respondent.

MCKINSTRY, J. An action to quiet title, commenced October 29, 1883. The court below adjudged in effect that the plaintiff had acquired the legal title to the land described in the complaint by an adverse possession continued for the statutory period. Appellant contends, it appears from the evidence, that the plaintiff and defendant were, at the commencement of the suit, and at the trial, tenants in common of the premises.

There was evidence that the predecessor in interest of the plaintiff had the actual, exclusive, and adverse possession, under color of title, of the whole of the land in controversy, from the year 1862 up to the seventeenth day of April, 1868, at least. Such possession, however, unless it continued to April 21, 1868,—five years from the approval of the act of limitations of 1863,—did not bar the right of possession of defendant's grantors.

On the seventeenth day of April, 1868, W. H. Campbell, J. B. Crockett, and Gwyn Page were the owners in fee-simple, as tenants in common, of the land the title whereof is here in dispute. On that day Campbell commenced an action of ejectment against the predecessor of the plaintiff for the recovery of the possession of the land, averring in his complaint that he was the sole owner thereof. The defendant in the ejectment, by answer, denied the title of the plaintiff therein.

While the ejectment was pending, and on the sixth day of March, 1869, Campbell, for a valuable consideration, executed

and delivered to the defendant therein a deed "of the whole of the premises" described in the complaint therein and herein. The action of ejectment was thereupon dismissed.

It is contended by appellant that the reception of the deed by plaintiff's predecessor made him a tenant in common with defendant's grantors, Crockett and Page.

Had Campbell been in the sole possession of the premises, and had he delivered the possession of the whole to the plaintiff's predecessor, the entry by the predecessor would have been in the assertion of an exclusive right in severalty, and equivalent to an express declaration on the part of the grantee that he entered "claiming the whole to himself." It would have been such a disseisin as would have set the statute of limitations in motion in his favor: *Bath v. Valdez*, 70 Cal. 350.

The grantee in the deed was in the adverse possession of the whole of the land prior to the execution and delivery of the deed. Crockett and Page could not say (nor can their successors say) that they had no knowledge of the deed, and, in the same breath, that the deed made the grantee a tenant in common with them. Taking notice of the deed, the subsequent possession of plaintiff's predecessor was, to their knowledge, referable to the deed, and was a possession with a claim of the whole title. The continued possession under the deed was as much a disseisin as would have been an entry under it. The mere commencement of the action of ejectment by Campbell, subsequently dismissed, did not deprive the plaintiff's predecessor of the benefit of his adverse possession, begun in 1862, and which was continued for a period of five years,—a period completed before the deed was executed by Campbell. Even if the taking of the deed was any evidence tending to prove that the possession, begun in 1862, was not previously adverse, yet the taking of the deed and possession under it was a denial of any right in Crockett and Page from the date of its delivery and acceptance.

It follows that plaintiff's predecessor did not become a tenant in common with Crockett and Page by receiving the deed from Campbell.

There is ample evidence that plaintiff's predecessor was in the actual, exclusive, and adverse possession of the land in controversy, claiming title to the whole thereof under the deed aforesaid for five years next succeeding the sixth day of March, 1869.

The defendant testified that, say, in November, 1876 (more

than seven years after the execution and delivery of the Campbell deed), he suggested to plaintiff's predecessor that they, together, should buy "the outstanding one fifth" of the property, to which the latter responded he could not afford it, — had no money; also, that shortly before the commencement of this action (more than fourteen years after the Campbell deed), the agents of the plaintiff asked defendant what he would take for his interest in the property; that he replied "six hundred dollars," and that the agents thereupon declared they would not give him sixty dollars for it.

It was for the court below to determine the credibility of the witness.

An offer to buy out a hostile claim in 1876 or 1883 could not invalidate the title of plaintiff or her predecessor: *Furlong v. Cooney*, 72 Cal. 322. Here is no question of estoppel. Having acquired the title by adverse possession, plaintiff, while she remained in possession, could be divested of such title only by conveyance in writing.

And even if it should be conceded that the declaration was made by plaintiff's predecessor in 1876, as testified to, and that it constituted some evidence tending to show that during the five years of possession immediately following the Campbell deed the occupant had not intended to hold adversely, it was but evidence, and very slight evidence; and the court below was justified in holding it did not overcome the effect of the clearly established, open, notorious, and exclusive possession of the land under the deed purporting to grant the entire title.

Nothing was decided in *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135, which is in conflict with the views above expressed. There the adverse possession of the defendants commenced in 1858. A special verdict found that the defendants "became tenants in common" with the plaintiff in 1860. The supreme court said that when the defendants became tenants in common with the plaintiff, their possession lost its hostile character. In *Miller v. Myles*, 46 Cal. 535, the appellant did not complain of the judgment letting the plaintiff into the possession as tenant in common, but for a judgment for mesne profits, claiming there was no ouster of the plaintiff prior to the commencement of the action.

The court below did not err in admitting evidence of the payment by plaintiff and her predecessor of street assessments and insurance premiums. Although perhaps not admissible

as evidence of the fact of possession, they tended in some degree to show that the claim of the actual possessor was to the whole title.

Judgment and order affirmed.

DEED BY CO-TENANT TO STRANGER, THOUGH IT PURPORTS TO CONVEY ENTIRE ESTATE, has no other effect than to invest the vendee with the rights of the vendor, and does not change the relation of co-tenant which has subsisted between the vendor and his co-tenant: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and see cases collected in note 284.

PURCHASE OF OUTSTANDING ADVERSE CLAIM TO LAND BY ONE IN POSSESSION, claiming adversely to all others, for the purpose of quieting his title, does not estop him from setting up the statute of limitations against a third party also claiming under an adverse title: *Cannon v. Stockman*, 36 Cal. 535; 95 Am. Dec. 205; and see *Arrington v. Liscom*, 34 Cal. 365; 94 Am. Dec. 722.

IF ONE TENANT IN COMMON CONVEYS WHOLE ESTATE IN FEE, and grantee enters and claims exclusive possession, he is deemed to hold adversely to other tenants in common, and his entry is disseisin, and possession thus for twenty years will bar title of co-tenants of grantor: *Rutter v. Small*, 68 Md. 133; 6 Am. St. Rep. 434.

[IN BANK.]

MALONEY v. HEFER.

[75 CALIFORNIA, 422.]

HOMESTEAD CAN BE CLAIMED IN THAT PORTION OF PREMISES ONLY WHICH IS OCCUPIED AS FAMILY RESIDENCE, where there were a front and rear house on a lot of land, separated by a fence and independent of each other, and the claimants resided in the rear house, and rented the front house to tenants.

ACTION by J. M. Maloney and wife to quiet the title to a lot of land which was owned by Mrs. Maloney as her separate property, and on which she had declared a homestead. The facts are stated in the opinion.

E. J. and J. H. Moore, Nathaniel Bennett, and Edward J. Pringle, for the appellants.

N. B. Mulville, for the respondent.

SEARLS, C. J. This cause was heard and decided by Department One, in an opinion filed November 30, 1887.

A rehearing was subsequently granted, and the cause has been reargued before the court in bank.

Counsel for appellants urges that the effect of the former

judgment was to reverse a finding of the court below which was not attacked. We draw no such inference from the decision.

Plaintiffs and appellants sought by their action to quiet title to a lot of land claimed as their homestead, having upon it a front and rear house, the former of which was rented to tenants, and the latter occupied by them as a family residence.

The wife made a declaration of homestead upon the whole property while so occupying the rear building, and had then rented such rear building, except one room therein reserved for storing the family furniture, and had removed temporarily from the premises, and remained absent therefrom for three or four months, during which time the declaration of homestead was filed and recorded. Defendant had caused that portion of the lot covered by the front house to be sold upon an execution issued on a judgment in his favor, and held a sheriff's deed therefor.

Defendant claimed title to the front portion of the lot under this sheriff's deed, but did not make any claim to the rear house and premises. The court found that the front house and premises were not the homestead of plaintiffs, and that defendant had title thereto; that the rear house and premises were the homestead of plaintiffs, etc., and quieted their title thereto.

Plaintiffs appealed from so much of the judgment as decreed defendant to be the owner of and quieted his title to the front house and premises.

As to that portion of the decree which awarded the rear house and premises to plaintiffs as their homestead and quieted their title thereto, there was no appeal.

It follows: 1. That what was said in the former opinion did not have, and could not have, any reference to the rear house and premises; and 2. That as plaintiffs claimed the front house and premises as a homestead, all questions touching the validity of such claim were pertinent to the inquiry on this appeal.

The fact that the same declaration of homestead covered the entire property, a portion of which is not in dispute, cannot preclude an inquiry into the sufficiency of that declaration, or the existence of the facts necessary to uphold it, so far as applicable to the subject of this controversy.

"The homestead consists of the dwelling-house in which

the claimant resides, and the land on which the same is situated": Civ. Code, sec. 1237.

It is the principal use to which property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead: *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516; *Gregg v. Bostwick*, 33 Cal. 220; 91 Am. Dec. 637.

And if only a part of the land described in the homestead declaration be actually used and appropriated as the home of the family, the remainder not so used and appropriated forms no part of the homestead claim, in the sense of the statute: *Mann v. Rogers*, 35 Cal. 319.

In *Tiernan v. His Creditors*, 62 Cal. 286, it was held that in case of the ownership of a double house, one side of which was occupied by the insolvent as a family residence, and the other side rented to tenants, the part so rented could not be set off as a homestead to the insolvent.

In *Laughlin v. Wright*, 63 Cal. 113, it was said: "But the mere filing of a declaration of homestead does not of itself constitute the premises embraced within it the homestead of the declarant. The use of the property is an important element to be considered. From the record in this case it appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. . . . But their residence there was but incidental to the business of running the hotel. . . . It would be doing violence to the statute to regard property so used as a homestead, which is, and was intended to be, the place where the home is."

The benign object of the statute was to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for the support of himself or family.

In view of this paramount object, the justice of the distinction made and the limitation placed upon the right of the homestead claimant is manifest.

As to the premises in dispute, the finding of the court, which is amply supported by the evidence, is against the appellants. It is as follows: "The plaintiffs have not lived in or occupied said front house or premises for over ten years last past, but have been renting the same to tenants during that time."

The findings then proceed to show that the premises in question are separated from the residence in the rear by a tight

board fence, and are separate and independent from each other, etc.

Premises thus separated and thus used were not subject to dedication as a homestead by the mere filing of a declaration as provided by the statute; and waiving all question as to a homestead right initiated by a declaration made when the parties lived upon the rear premises, but filed and recorded after they had left and temporarily rented such premises, and the conclusion is still inevitable that, as to the front lot, it did not and could not become a homestead, because not used as a home at the time of, or for many years prior to, the declaration by which it was sought to impress it with that character.

The judgment and order appealed from are affirmed.

IN WHAT PREMISES HOMESTEAD MAY BE ACQUIRED: *Hogan v. Manners*, 23 Kan. 551; 33 Am. Rep. 199; *Casselman v. Packard*, 16 Wis. 114; 82 Am. Dec. 710; *Gregg v. Bostwick*, 33 Cal. 227; 92 Am. Dec. 637; *Tiernan v. His Creditors*, 62 Cal. 286.

ONE CAN CLAIM HOMESTEAD ONLY when a resident of the state: *Finley v. Saunders*, 98 N. C. 462; *Baker v. Leggett*, 98 Id. 304; and the "homestead" is the dwelling-house where the family resides, and must be actually used as such: *Bebt v. Crowe*, 39 Kan. 342.

[IN BANK.]

HEILBRON v. FOWLER SWITCH CANAL COMPANY.

[75 CALIFORNIA, 426.]

APPEAL FROM JUDGMENT WILL BE DISMISSED IF NOT TAKEN WITHIN ONE YEAR after the entry of judgment, as provided for by section 939 of the Code of Civil Procedure of California.

RIPARIAN PROPRIETOR IS ENTITLED TO INJUNCTION RESTRAINING UNLAWFUL DIVERSION OF WATERS OF STREAM, although the injury caused by the diversion is incapable of ascertainment, or of being computed in damages.

RIGHTS OF RIPARIAN PROPRIETOR DO NOT DEPEND UPON QUANTITY OF WATER flowing in the stream.

RIPARIAN PROPRIETOR CANNOT AUTHORIZE CORPORATION TO TAKE WATER FROM STREAM, to be conducted to a distance and there sold, as against a lower proprietor.

TENANT FOR YEARS OF LAND BORDERING ON STREAM, WITH PRIVILEGE OF PURCHASING DURING TERM; MAY ENJOIN UNLAWFUL DIVERSION of the waters of the stream, the injunction necessarily becoming inoperative if the estate which it was designed to protect ceases.

ACTION TO RESTRAIN DIVERSION OF WATERS OF STREAM AND FOR RECOVERY OF DAMAGES CANNOT BE PLEADED IN ABATEMENT of a subsequent action brought by the same plaintiffs and others against the same de-

endant, in which no damages are asked, and in which the complaint charges the actual diversion and threats to continue the same at a date subsequent to the bringing of the first action.

ACTION to restrain the diversion of the waters of a stream
The facts are stated in the opinion.

Edward J. Pringle, Garber and Bishop, and E. C. Winchell,
for the appellant.

Brown and Daggett, for the respondent.

TEMPLE, J. The facts constituting the plaintiffs' case in this action are pretty much the same as in the case of *Heilbron v. Last Chance Water Ditch Co.*, 75 Cal. 117, recently decided by us.

Plaintiffs are in possession of the rancho Laguna de Tache, containing about fifty thousand acres of land, under a lease for ten years, with the privilege of purchasing during their term. Kings River forms a boundary of this farm for thirty miles, and dividing at a point within this distance, one channel of the river called Cole Slough flows through the rancho for a distance of ten miles.

Plaintiffs claim under a Mexican grant, made January 10, 1846. The claimant filed his petition for the confirmation of his title with the land commissioners to ascertain and settle private land claims in California, February 15, 1853, and, the title being confirmed, a patent was issued for the same March 6, 1866.

Kings River rises in the Sierra Nevada Mountains, and carries at its lowest stages only about one thousand cubic feet of water per second, and at the highest stages, during the time of melting snows in the spring and summer, a much larger volume, sometimes as much as fifteen thousand cubic feet per second. During ordinary stages of water, Cole Slough carries the larger portion of the waters of Kings River, and during the period of low water all that reaches the point of divergence.

For more than two years before the bringing of this action the plaintiffs had maintained and cultivated about three thousand acres of alfalfa upon the land, and to irrigate the alfalfa, water their stock, and increase the productiveness of their land, they had built a dam in Cole Slough, and constructed canals and ditches leading out of Cole Slough, conducting the water over their land, increasing its productiveness, and furnishing water for their cattle, amounting to ten thousand head, which were entirely dependent upon the river for water to drink.

The defendant is a corporation, organized to appropriate and divert the water of Kings River, and avers in its answer that it has taken all the steps required under the Civil Code to authorize it to appropriate fifteen hundred cubic feet per second, flowing continuously, and at great expense has constructed a canal with a capacity of from one thousand to fifteen hundred cubic feet per second, sufficient for irrigating two hundred and forty thousand acres of land; that the stockholders own about sixty thousand acres of land along the canal and its branches.

The land owned by the stockholders is a long distance from the river, none of them being riparian owners, and no portion of the water would ever find its way again into the river.

It was found as a fact that the defendant threatens to, and unless enjoined will, divert three hundred cubic feet of water per second, and as much as fifteen hundred cubic feet of water per second when there is the last-named quantity flowing in the river at the head of defendant's canal, and the rancho Laguna de Tache will be deprived of a material and substantial quantity of water; that plaintiffs will be deprived of the use of water with which to irrigate said land, their cattle of sufficient quantity to drink, and that great damage and injury will occur annually, and of such extent that the same cannot be justly computed or estimated, and an action for damages would not afford an adequate remedy.

The defendant does not deny that it threatens to divert from the stream one thousand cubic feet of water per second, but denies that it proposes to take all the water of Kings River, or a sufficient quantity to injure the lands of plaintiffs, and alleges that defendant claims the right of withdrawal of water only in proportion to the supply which may be flowing in the river, and does not intend to divert the whole amount provided in its articles of incorporation, nor three hundred cubic feet, as alleged in the complaint.

The answer also avers that defendant was incorporated for the purpose of acquiring the title to one thousand cubic feet of water per second, which amount they purchased from one Dusy, and that since they have taken under the code five hundred additional cubic feet per second, and that it has commenced the construction of a suitable dam and head-gate sufficient to divert that amount of water, the canal being eighty feet wide and five feet deep, and had so far completed the work as to be able to divert fifteen hundred cubic feet of water per second, "so appropriated and owned by defendant,

into its canal, and to conduct the same along and through its said canal a distance of twenty-one miles," and that they have expended in its construction one hundred and ten thousand dollars.

Plaintiffs recovered judgment, and the defendant appeals from the judgment, and from an order denying its motion for a new trial. The appeal from the judgment, not having been taken within one year, must be dismissed.

On the trial the defendant attempted to prove its right as an appropriator by showing its compliance with the provisions of the code. This evidence was excluded, on the objection of plaintiffs, and defendant excepted.

The court also excluded, against the exception of the defendant, evidence tending to show that there was no appreciable difference in the quantity of water in Kings River at the time when defendant was taking water and at a time when it was not taking water from the river. In like manner, the court refused to permit the defendant to show that its officers had instructed its head-gate keeper that, whenever the water was low in the river, and there could be any cause of complaint by any one, it would make an appreciable difference in the quantity of water in the river, he was not to take water, but to shut down his gate, and only take water when it would make no appreciable difference in the quantity flowing in the river.

The first point made by appellant is, that where a party suffers no appreciable injury, and is threatened with none, he cannot invoke the aid of a court of equity to restrain a trespass, but will be left to his remedy at law.

Perhaps this proposition might be admitted without affecting the merits of this appeal.

It does not follow, because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can properly be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable; that it was unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue.

This question is, however, not an open one in this state, but has been repeatedly passed on and settled in unmistakable terms: *Lux v. Haggin*, 69 Cal. 258; *Moore v. Clear Lake W. Co.*,

68 Id. 150; *Stanford v. Felt*, 71 Id. 249; *Parke v. Kilham*, 8 Id. 77; 68 Am. Dec. 310; *Ferrea v. Knipe*, 28 Cal. 341; 87 Am. Dec. 128.

No doubt there are cases in which a court will refuse to interfere by injunction to prevent a trespass, where it can see that the injury will be slight, and the injunction may work great injury. Here the defendant professes to take from plaintiffs their property, really upon the plea that it is worth but little to the plaintiffs, and much to the defendant. It is not an ordinary trespass. It is a perpetual taking of the property of the plaintiffs,—a continuous nuisance, which may ripen into a right unless prevented.

The injury is one, also, which, in its nature, cannot be estimated. In the recent case of *Heilbron v. Last Chance Water Ditch Co.*, 75 Cal. 117, it was said: "The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation, and the growth and decay of vegetation add, not only to the fertility, but to the substance and quantity of the soil."

If this be so,—and it cannot be doubted,—it is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for thirty miles along its boundary, and ten miles through it, cannot be inconsiderable, but yet the extent of benefit must ever be an unknown quantity.

The defendant here states that the channel of the river above and along this land is deep, and therefore at times of ordinary flow the seepage cannot be great. If so, it must be important to plaintiffs that the channel should carry a full stream, and evidently at such times the percolation would be increased.

2. The right claimed by the defendant is not to appropriate the surplus waters of extraordinary floods, when the flow is more destructive than useful. It claims as an appropriator a certain quantity of water, adversely to the riparian proprietor; and if the claim be valid, it may be asserted at any stage of the water. But the rights of the riparian proprietor do not depend upon the quantity of water flowing in the stream. Nor can that flow be said to be an extraordinary flood which can be counted upon as certain to occur annually, and to continue for months. The defendant has no reservoir to retain the surplus waters of casual and unusual freshets, and its works would be of little value if its dependence were only upon such waters.

And certainly it would be a poor protection to the plaintiffs to have to depend upon the keeper of the head-gate of defendant to take only a proportionate amount of water, or to take water only when it could be done without injury to plaintiffs. There was no error in excluding the offered testimony.

We see nothing in the suggestion that defendant is presumably the licensee of the United States, and that the United States, being an upper riparian proprietor, could take a reasonable quantity of water as against the lower riparian owner.

A riparian owner may not authorize, as against a lower proprietor, a company to take water from the stream, to be conducted at a distance and sold.

We see no occasion to discuss the question as to whether the river is navigable or not. In either event the result would be the same. The riparian owner on a non-tidal, navigable stream has all the rights of a riparian owner not inconsistent with the public easement: *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Moore v. Sanborne*, 2 Mich. 519; 59 Am. Dec. 209; Wood on Nuisances, sec. 485; *Smith v. City of Rochester*, 92 N. Y. 463; 44 Am. Rep. 393; *Woodruff v. North Bloomfield G. M. Co.*, 9 Saw. 441.

Beside, Cole Slough is not claimed to be a navigable stream. The right of the state to interfere with the flow there would certainly be limited to the interest of navigation.

The estate of the plaintiffs is sufficient to enable them to maintain this action. They were lessees for a term of ten years, with the privilege of purchasing during that time. If they fail to perfect the purchase, the fact that the injunction is in form perpetual cannot injure the defendant. If the estate which the injunction was designed to protect cease to exist, there would be no one to enforce the judgment, for there would be no one in privity with the plaintiffs. Practically, it would cease to exist.

The plea in abatement cannot be sustained. The same plaintiffs, excepting only the representatives of the estate of Poly, commenced a suit for a similar purpose against this defendant, but in that suit claimed damages. That suit is still pending, and in it defendant has appeared and answered.

Originally the parties to the two suits were precisely the same, but after the plea in abatement was filed, the plaintiff, by leave of the court, amended, making the representatives of Poly co-plaintiffs.

Now, the action differs from the former one, in that the

plaintiffs are not entirely the same, and no judgment for damages is asked, and the last complaint charges the actual diversion, and the threats to continue at a date subsequent to the bringing of the first action. Considered merely as a matter of amendment, the court properly allowed it. The plea in abatement is not favored, and the fact that the parties are not the same justifies the ruling of the court below.

The appeal from the judgment is dismissed, and the order denying the motion for a new trial is affirmed.

In the case of *Heilbron v. Last Chance Water Ditch Company*, 75 Cal. 117, referred to in the foregoing opinion, the same plaintiffs brought an action against the Last Chance Water Ditch Company to restrain it from diverting the waters of Kings River, and for damages for past diversion. The defendant set up a right to divert the waters, by virtue of an adverse user for a time exceeding that required by the statute of limitations; while the plaintiffs contended that during a lease which had been made of the land, the land being in the possession of tenants, the landlord could not have maintained an action for the diversion, and that therefore the statute did not begin to run against him. The court held that the landlord, the owner of the fee, might have maintained the action while the land was in the possession of the tenants, the injury being an injury to the inheritance, and that not having commenced an action within the period prescribed by the statute, he and the plaintiffs were barred.

DIVERSION OF WATERS FROM STREAM — RIGHT OF RIPARIAN PROPRIETOR TO REMEDY BY INJUNCTION: *Burden v. Stein*, 27 Ala. 104; 62 Am. Dec. 758; *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 400; 38 Am. Rep. 452; *Smith v. City of Rochester*, 92 N. Y. 463; 44 Am. Rep. 393.

RIPARIAN PROPRIETOR CAN APPROPRIATE RUNNING SURFACE WATER to his own use, but must not so divert it as to prevent use of it by those below him: *Redman v. Forman*, 83 Ky. 214.

BRISON v. BRISON.

[75 CALIFORNIA, 525.]

CONSTRUCTIVE TRUSTS IN REAL PROPERTY ARE EXCEPTED FROM OPERATION OF STATUTE OF FRAUDS, and may be established by parol.

GRANTEE IS GUILTY OF ACTUAL FRAUD IF HE OBTAINS ABSOLUTE DEED WITHOUT CONSIDERATION BY MEANS OF PAROL PROMISE TO RECONVEY, made without any intention of performing it, and cannot interpose the statute of frauds as a defense to an action to declare a constructive trust in the land.

GRANTEE'S VIOLATION OF PROMISE TO RECONVEY IS CONSTRUCTIVELY FRAUDULENT, and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol promise to reconvey to the grantor, to whom he stands in a confidential relation, even if there be no intention at the time not to perform the promise.

WANT OF CONSIDERATION IN DEED MAY BE SHOWN, NOTWITHSTANDING RECITAL THEREOF, in connection with and as a part of the fraud which is charged in obtaining the deed.

RELATION OF HUSBAND AND WIFE IS CONFIDENTIAL in their transactions with each other, under section 158 of the Civil Code of California.

ACTION to have a trust declared in real property, and for a conveyance. The opinion states the facts.

A. P. Catlin and Add. C. Hinkson, for the appellant.

W. H. Beatty and A. L. Hart, for the respondent.

HAYNE, C. This is a suit to have a trust declared as to real property, and for a conveyance. The complaint shows substantially the following facts:—

The plaintiff and the defendant were husband and wife. The plaintiff was the owner of the property in controversy, upon which there was a mortgage. In order to raise money to pay off the mortgage, the plaintiff determined to go to Arizona and engage in business there, and was desirous of making a will before his departure, so that the property should go to his wife. But being influenced by the wish to save her the expense of probate proceedings in case of his death, and having confidence in her, and relying on her parol promise that she would reconvey to him upon his request, he made a deed to her, absolute in form, and took no written acknowledgment from her. The deed recited that it was made in consideration of love and affection and of the sum of one dollar, the receipt of which was acknowledged. But it is averred that "though said deed recites a consideration, yet in truth and fact there was no consideration therefor, and no money was paid or intended to be paid as a consideration for said deed." It is also averred that the promise by which plaintiff was induced to make the deed was in bad faith and false, and "made with intent on her part to deceive, and did deceive, the plaintiff."

The defendant having refused to reconvey the property, the plaintiff brought this suit to compel a reconveyance. The court below gave final judgment for the defendant upon demurrer, and the plaintiff appeals.

The argument for the respondent is based upon the statute of frauds, and upon the rule that a writing shall not be contradicted or added to by parol evidence.

The statute of frauds expressly provides that a contract to convey land shall be void unless in writing: Civ. Code, sec. 1624, subd. 4; and that no trust in real property shall be valid

unless created by writing or by operation of law: Civ. Code, sec. 852. Under these provisions there can be no doubt but that the defendant's promise to convey was invalid, and could not be enforced as such. It is to be observed, however, that the statute excepts from its operations such trusts as arise "by operation of law." Substantially the same exception is in the English statute of frauds and in the statutes of most of the United States. And the universal construction given to it is, that it excepts from the operation of the statute, among other things, trusts which arise from fraud, actual or constructive,—or, as they are termed, constructive trusts. It is no longer worth while for any counsel to argue against this construction of the statute. The only point which is open to debate in cases of this character is, whether the facts show such a case of fraud as falls within the exception. Such fraud may be either actual or constructive, and in our opinion both exist in the case before us.

1. We think there was actual fraud. As above stated, the complaint shows that the parol promise upon which plaintiff relied was false and "in bad faith," and "made with intent to deceive." The construction which we think must be given to this averment is, that the promise was made without any intention of performing it. This is a well-recognized species of fraud: See Bigelow on Fraud, ed. 1888, 483, 484; *Sandfoss v. Jones*, 35 Cal. 481, 482. And the Civil Code expressly provides that "actual fraud . . . consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: . . . A promise made without any intention of performing it": Civ. Code, sec. 1572. Now, inasmuch as it is admitted by the demurrer that the promise was made without any intention of performing it, we think the case falls directly within the provision. An instance of the application of the principle to facts similar to those of the case before us is *Newell v. Newell*, 14 Kan. 202.

It is to be observed of this ground that the essence of the fraud is the existence of an intent at the time of the promise not to perform it. But for such intent, there would be no actual fraud. For it is well settled that the mere failure to fulfill a promise is not fraud: *Perry v. McHenry*, 13 Ill. 236; *Wheeler v. Reynolds*, 66 N. Y. 234; *Levy v. Brush*, 45 Id. 589; *Burden v. Sheridan*, 36 Iowa, 125; 14 Am. Rep. 505; *Cowan v. Wheeler*, 25 Me. 267; 43 Am. Dec. 283; *Boyd v. Stone*, 11

Mass. 348. But if the evil intent existed, there was actual fraud, and so far as this ground is concerned, it is immaterial whether there was a confidential relation or not: *Christy v. Sill*, 95 Pa. St. 387.

If actual fraud existed, the statute of frauds is no defense. And it does not need any citation of authorities to prove that in cases of such fraud the rule as to contradicting or adding to a writing by parol evidence has no application.

2. But if the intent not to perform, above referred to, had not been averred, we think the plaintiff is, nevertheless, entitled to relief upon the other facts alleged, on the ground of the confidential relation existing between the parties.

It is not every case where parties trust each other that the law recognizes as confidential: *Doyle v. Murphy*, 22 Ill. 508; 74 Am. Dec. 165; *Steele v. Clarke*, 77 Id. 474; *Weer v. Gand*, 88 Id. 493, 494. But the relation of husband and wife is expressly declared by statute to be of that character. The provision of the Civil Code is as follows:—

“Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.”

It is not surprising that, in taking away the wife's common-law incapacity to contract, the legislature should have thought it prudent to throw around her the safeguards which arise from the trust relation. Possibly, at first view, it might seem strange that it should have been thought necessary to accord the same protection to the husband. Perhaps this is to be regarded as an acknowledgment of woman's position in modern society. But, at any rate, the provision is in positive and direct language, and where such is the case, the courts are not at liberty to disregard it.

Nor is it necessary to consider what would be the rule in cases where it appears that there was in fact no actual confidence between the parties,—that is to say, where the wife is living in independence of or in hostility to the husband: See *Falk v. Turner*, 101 Mass. 496. For it is averred that the plaintiff “had at all times confidence in his said wife and her devotion and fidelity to him,” and that he made the deed “having confidence in his said wife, and in her said representation and promises, and relying upon the same.”

The relation of the parties to each other, therefore, was confidential in fact as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it.

The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud: 1 Story's Eq. Jur., secs. 258, 307. The law, from considerations of public policy, presumes such transactions to have been induced by undue influence: Civ. Code, sec. 2235; Bigelow on Fraud, ed. 1888, 261, 262; Kerr on Fraud and Mistake, Bump's Am. ed., 151; Hovenden on Fraud, 18. The extent and variety of the application of this principle to persons in confidential relations with each other may be seen from the notes to the leading case of *Huguenin v. Basely*, 2 Lead. Cas. Eq., pt. 2, p. 38. From the cases there cited, it will abundantly appear that while it is not impossible that a gift between persons in such relations may be valid, yet that all such transactions are constructively fraudulent, and are only to be upheld upon a showing of special circumstances: See also *Hatch v. Hatch*, 9 Ves. 296. Now, if this be so,—if the law does not permit such transactions to stand even where there was an intention that the donee should have the property,—how much more should it interpose where, as here, there was no such intention, but only an intention that she should retain the semblance of ownership for a time.

We think the authorities fully bear out the assertion that in such cases a constructive trust arises, and that the statute of frauds has no application.

In *Wood v. Rabe*, 96 N. Y. 426, 48 Am. Rep. 640, a son was induced by the parol promise of his mother to confess a judgment in her favor, and allow her to purchase under it a piece of his real property. It was held that a constructive trust arose; and the court, per Andrews, J., said: "It was on the part of the son the case of a confidence induced, not by the bare promise of another, but by the promise and the confidential relations conjoined. The confidence, in fact, has its spring and origin in the relation, and that relation was a controlling ingredient moving his action. It would be a gross wrong to permit that confidence to be betrayed, and we are of opinion that the statute of frauds cannot be invoked as a bar to relief. The principle that when one uses a confidential relation to

acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds."

So where a devise is made to one, upon his parol promise to hold it in trust for another, a trust arises, and the statute of frauds is not allowed as a defense: *Church v. Ruland*, 64 Pa. St. 442; *Barrell v. Hanrick*, 42 Ala. 71, 72; *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52. So it has been held (although there is some conflict in the authorities) that where one is allowed to purchase at an execution sale upon his parol promise to hold for the judgment debtor, a trust arises: *Wolford v. Herrington*, 74 Pa. St. 311; 15 Am. Rep. 548; *Arnold v. Cord*, 16 Ind. 177.

But the case which we think is most directly in point is *Young v. Peaby*, 2 Atk. 254. There a father obtained from his daughter, without consideration, a conveyance of real property, upon his parol promise to hold it for a particular purpose, viz., "as a trustee only for her and her heirs, . . . and that he would not claim or insist upon any benefit or advantage thereof." No actual fraud was shown. The father died bankrupt; and on a bill against the assignees, it was decreed that the conveyance should be set aside, not upon the ground of an implied or resulting trust, but upon the ground of constructive fraud, which would now be said to give rise to a constructive trust. Lord Hardwicke said: "There have been a great many cases even since the statute of frauds where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which this court ought to relieve against; the doing it is *dolus malus*, and that appears to be the present case": See also *Haigh v. Kaye*, L. R. 7 Ch. 469.

The principle of this case was extended in *Murray v. Dake*, 46 Cal. 648, 649, to a transaction between parties who did not stand in confidential relations to each other. Whether that was a proper extension of the principle need not be considered here.

It must be admitted that there are cases in which the relief has been denied. But it will generally be found that in such cases the confidential relation has been overlooked. And we

think the cases we have cited are in accordance with sound principle. For if the relief cannot be granted in this case, we do not see how it could be granted if an attorney should, by his parol promise, induce his client to put the property in his name for some temporary purpose, and then refuse to reconvey on the ground of the absence of a written acknowledgment; and so of principal and agent, parent and child, trustee and *cestui que trust*, etc.

It is to be observed that the trust is not a resulting trust, properly so called. The relief is not granted merely on the ground of want of consideration. The fact that a deed is without consideration, or is, as is sometimes said, voluntary, is not of itself sufficient to avoid the deed: *Viney v. Abbott*, 109 Mass. 300; *Jackson v. Garnsey*, 16 Johns. 189; *Green v. Thomas*, 11 Me. 321; *Laberee v. Carleton*, 53 Id. 212; *Poe v. Domec*, 48 Mo. 443. This is at least one of the things designed to be expressed by section 1040 of the Civil Code, which provides that "a voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general, except that a consideration is not necessary to its validity." The want of consideration, however, is a fact proper to be proved in connection with and as a part of the constructive fraud: *Shotwell v. Shotwell*, 24 N. J. Eq. 385.

Nor does the recital of a consideration stand in the way of the relief. As is well known, it was a settled rule of the early law that if no consideration was expressed or proved, a use resulted to the grantor. To prevent this, it became common to make the deed recite a consideration. And while such recital could be contradicted for collateral purposes, it could not be contradicted for the purpose of avoiding the deed: *Farrington v. Barr*, 36 N. H. 89; *Coles v. Soulsby*, 21 Cal. 47; *Rhine v. Ellen*, 36 Id. 369; *Martin v. Splivalo*, 69 Id. 614; or for the purpose of raising a resulting trust: *Russ v. Mebius*, 16 Id. 356; *Graves v. Graves*, 29 N. H. 129; *Philbrook v. Delano*, 29 Me. 412, 413. But this only means that the recital could not be contradicted for the mere purpose of showing a want of consideration. Where fraud is charged, the want of consideration may be shown in connection with and as part of the fraud. In cases like the present, the confidential relation is one circumstance, the parol promise is another, and the want of consideration is a third. In cases of fraud, actual or constructive, no mere form of words which the parties have made

use of can shut out inquiry as to the real facts. And this from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown?

The objection that parol evidence is not admissible to contradict or to add to the deed is a distinct ground from the statute of frauds: 1 Story's Eq. Jur., sec. 158. The admissibility of such evidence is sometimes put upon the ground that it does not contradict or add to the deed. Thus in *Hall v. Livingston*, 3 Del. Ch. 373, the chancellor said in reference to this subject: "There is a well-recognized distinction between contradicting a deed or impairing its legal operation, and raising out of the transaction an equity *dehors* the deed, binding the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud. Such an equity is held to be independent of the deed, and not excluded by it as a mere conveyance of the legal estate, unless there be in it some terms or implication to that effect. To support such an equity, parol evidence is admissible, not as contradicting the deed, but as explanatory of the transactions out of which the equity arises."

Perhaps the most comprehensive and philosophical expression of the rule is, that parol evidence is admissible to raise a trust in cases of actual or constructive fraud. But whatever may be thought of the terms in which it is expressed, the rule itself is well settled: 2 Wharton on Evidence, sec. 1038; Bigelow on Fraud, ed. 1888, c. 10, sec. 8; *Reeves v. Bass*, 39 Tex. 631; *Church v. Ruland*, 64 Pa. St. 442; *Isenhoot v. Chamberlain*, 59 Cal. 637.

If we are right in the foregoing, the point as to the necessity of an acknowledgment by the wife before a notary does not require serious consideration. The statute has no relation to trusts raised by parol evidence.

We therefore advise that the judgment be reversed, with directions to overrule the demurrer to the complaint, with leave to defendant to answer.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer to the complaint, with leave to defendant to answer.

ABSOLUTE DEED ON GRANTEE'S ORAL PROMISE TO SELL PREMISES, DISCHARGE MORTGAGE, PAY SURPLUS, AND RECONVEY any unsold part to grantor's wife, is a valid trust: *Clark v. Haney*, 62 Tex. 511; 50 Am. Rep. 536.

TRUST RESULTING TO PRINCIPAL IN LANDS BOUGHT BY AGENT IN HIS OWN NAME: *Rose v. Hayden*, 35 Kan. 106; 57 Am. Rep. 145; and see *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696.

CONSTRUCTIVE TRUST, FRAUD AS GROUND FOR CONVERTING CONVEYANCE INTO: *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 272, note.

GRANTEE IS NOT AFFECTED BY SEPARATE DECLARATION OF TRUST not referred to in the deed nor known to the grantee: *Rogers v. Rogers*, 53 Wis. 36; 40 Am. Rep. 756.

PAROL EVIDENCE MAY BE INTRODUCED TO SHOW THAT FRAUD WAS PRACTICED, not only in the execution of a deed, but in obtaining the acknowledgment: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552.

RESULTING TRUSTS MAY BE ESTABLISHED BY PAROL EVIDENCE, but such evidence must be very clear, certain, and convincing: *Anthe v. Neide*, 85 Ala. 236; *Woodward v. Sibert*, 82 Va. 441; *Parker v. Logan Brothers & Co.*, 82 Id. 376; *Sullivan v. Sullivan*, 86 Tenn. 376. But resulting trusts cannot be created by parol agreements or payments of money made before or after the title passes, unless at that instant the facts existent will raise a trust: *Sullivan v. Sullivan*, *supra*. Nor will parol agreements that another shall be interested in a purchase, or parol declarations by purchaser that he buys for another, without an advance of money by that other, raise a resulting trust, but will be inoperative under the statute of frauds: *Bland v. Tulley*, 50 Ark. 71.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**NEW YORK AND COLORADO MINING SYNDICATE
AND COMPANY v. ROGERS.**

[11 COLORADO, 6.]

VERDICT NOT DISTURBED WHERE EVIDENCE IS IN CONFLICT. — Where, in an action to recover damages for personal injuries caused by the employment of defective appliances, and negligence connected therewith, the evidence is conflicting, and the jury elect to accept that produced by the plaintiff, such election will not be questioned on appeal.

MASTER AND SERVANT — UNSAFE APPLIANCE — FINDING OF JURY CORRECT. — Where, in an action to recover damages for personal injury sustained by a falling bucket in a shaft, and caused by unsafe appliances, and negligence connected therewith, it appears that the bucket in use was hoisted and lowered by means of a rope, about eight feet of the lower end of which was wet and frozen, and with great difficulty fastened to the bail of the bucket; that at the time of the accident the rope was adjusted and fastened in the usual manner; that the foreman had previously given instructions to have the frozen part of the rope cut off, and apparatus substituted so as to make the fastening secure; that immediately after the accident this was done, and within thirty-six hours safe appliances were in use; that the evidence was conflicting as to whether a pin to fasten the rope to the bucket was furnished, or could have been used if furnished, and also as to whether specific instructions were given as to how the fastening should be made, — the jury were justified in finding the appliance unsafe, and that defendant had knowledge of its condition before the accident.

CONTRIBUTORY NEGLIGENCE — PRESUMPTION. — Where, in an action for damages for personal injury, the question of contributory negligence is fairly submitted to the jury, it will be presumed that they considered it, and the judgment will not be disturbed, in the absence of error in receiving evidence, or in charging the jury.

MASTER AND SERVANT — DECLARATIONS OF FOREMAN AS RES GESTÆ. — Where, in an action to recover damages for personal injury received

from the use of unsafe appliances, it appears that the foreman on the ground, in charge of the work and acting directly in the line of his duty, made declarations as to the unsafe condition of the appliances immediately or within half an hour after the accident, such declarations are admissible as part of the *res gestæ*.

ACTION by Rogers to recover for personal injuries received while in the employment of the appellant company. The plaintiff, being a carpenter, was working at the bottom of a shaft, and his tools and materials were lowered to him by means of a bucket worked by a windlass. This bucket became unfastened from the rope which held it, and descended the shaft, striking plaintiff about the head and legs, injuring him and bruising other parts of his body. His injuries, though severe, did not prevent him doing light work again in two or three weeks after the accident. He recovered verdict and judgment for three hundred dollars, and from the judgment this appeal is taken.

M. B. Carpenter, for the appellant.

No appearance for the respondent.

HELM, J. The ground of recovery upon which plaintiff below relied was negligence on the part of defendant in not furnishing and maintaining safe machinery or appliances for the work in which he was engaged. The rule upon this subject is familiar. It will be found sufficiently stated in *Wells v. Coe*, 9 Col. 159.

As to the defective condition of the appliance in use, and the negligence of defendant in connection therewith, the evidence is conflicting. The witnesses upon this question offered by the respective parties are about equal in number, and where conflicts occur the jury undoubtedly accepted the testimony of those produced by plaintiff. Such election of the jury will not be questioned by us.

Bearing this in mind, we turn to the testimony, and find that the bucket supplied was large, being the half of a barrel which had been sawed in two in the middle; that it was detached from the rope when hoisted, and reattached upon lowering; that about eight feet of the lower end of the rope in use had been wet, and was frozen stiff, so that it could with great difficulty be fastened to the bail of the bucket; that this rope was adjusted at the time of the accident in the usual manner, that is, in the way the men were in the habit of making the fastening. There is conflict as to whether a "pin" was fur-

nished, and as to whether the frozen rope could have been passed through the loop in the bail so as to use a pin, had there been one; also as to whether specific orders were given concerning the manner of fastening the rope to the bail. It appears that the foreman had previously given instructions to have the frozen part of the rope cut off, and apparatus substituted so as to make the connection more secure; likewise that, immediately after the accident, this was done by making a knot, the frozen end being removed, and the foreman remarking that "in the morning he would have it fixed safe." Within thirty-six hours a chain with an open link and proper accessories were furnished and in use. We think the jury were justified in finding the appliance in question unsafe; also that defendant had knowledge of its condition at least two weeks before the accident. We cannot say that the jury should have charged plaintiff with contributory negligence. This question was fairly submitted to them, and we must presume that they considered it. Therefore, unless error was committed in receiving evidence or in charging the jury, the judgment should not be disturbed.

But it is argued by counsel for appellant that there was error in admitting proof of the foreman's declaration as to the unsafe condition of the connecting appliance furnished. No doubt exists about the making of the statement, for the foreman admits it. Counsel's position is, that, being made after the injury, it should have been regarded as hearsay, and rejected. According to the testimony of one witness, the declaration was made about thirty minutes after plaintiff was hurt; another witness declares that it was made "just after the accident," but admits on cross-examination that it might have been "half an hour after"; while the foreman himself, who was defendant's witness, says it was "immediately after the accident." The foreman was defendant's agent in charge of the mine, and was upon the ground when plaintiff was injured. He proceeded at once to the shaft, and directed the employees to fix the appliance in question. His remark was called forth by the accident, and was uttered while giving instructions with reference to that which plaintiff claims was its cause. His good faith towards defendant, and devotion to its interests are unquestioned. His purpose in the changes ordered was undoubtedly to remove danger and prevent repetitions of similar injuries in the future. He was acting directly in the line of his duty, and for the time being stood in the shoes of

his principal. The main facts under investigation by the jury upon the trial were the accident and its cause. The declaration in question was not an idle statement, wholly disconnected from the principal fact. It tended to throw light upon the circumstances attending the injury, including the cause thereof, and to illustrate its character. We shall hold that there was no abuse of the "sound discretion" lodged with the court in admitting it as part of the *res gestæ*.

It is not necessary to discuss the specific assignments of error relating to the charge. Each of defendant's instructions refused was defective in one or more important particulars, and should not have been given. Considered as a whole, the charge is not obnoxious to the objections urged in argument. The judgment is affirmed.

VERDICT WILL NOT BE DISTURBED WHERE EVIDENCE IS CONFLICTING: *Wilcoxson v. Burton*, 27 Cal. 228; 87 Am. Dec. 66, note; *Van Dusen v. Star etc. Co.*, 36 Cal. 571; 95 Am. Dec. 209; *St. Louis etc. R. R. Co. v. Terhune*, 50 Ill. 151; 99 Am. Dec. 504; *Continental Life Ins. Co. v. Young*, 113 Ind. 159; 3 Am. St. Rep. 630; *Colton v. Shaffer*, 23 Neb. 724; *Clarke v. Chicago etc. R. R. Co.*, 23 Id. 613.

DUTY OF MASTER TO FURNISH SAFE APPLIANCES: *Sutridge v. Missouri etc. R. R. Co.*, 94 Mo. 468; 4 Am. St. Rep. 392, and note 395; *Wuotilla v. Lumber Co.*, 37 Minn. 153; 5 Am. St. Rep. 832, and note 836; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266, and note 274; *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348; *Atchinson etc. R'y Co. v. McKee*, 37 Kan. 592; *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230, and note 240; *P. & R. R'y Co. v. Hughes*, 119 Pa. St. 301.

DECLARATIONS, WHEN ADMISSIBLE AS PART OF THE RES GESTÆ: *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49, and extended note; *McDowell v. Goldsmith*, 6 Md. 319; 61 Am. Dec. 305; *Frink v. Coe*, 4 G. Greene, 555; 61 Am. Dec. 141; *Simon v. Manning*, 99 N. C. 327; *Hamilton v. State*, 10 Am. Rep. 22, and note 28; *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 894, and note 896; *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230, and note 240; when admissible in suit for injuries from use of defective machinery: *Atchison etc. R'y Co. v. Sadler*, 38 Kan. 128; 5 Am. St. Rep. 729.

ADAMS v. SCHIFFER.

[11 COLORADO, 15.]

MISREPRESENTATION TO AVOID CONTRACT must be the proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place.

FRAUD MUST RELATE TO FACTS THEN EXISTING, or which had previously existed; hence non-performance of a promise made in the course of negotiations is not of itself fraud or evidence of fraud, and the fact that a party has been defrauded by subsequent transactions cannot operate to affect or invalidate a prior independent contract made, entered into, and executed for a good and valuable consideration.

DURESS OF GOODS. — WHERE PARTY HAS POSSESSION or control of the property of another, and refuses to surrender it to the control and use of the owner except upon compliance with an unlawful demand, a contract made or money paid by the owner under such circumstances, to emancipate the property, is to be regarded as made under compulsion and duress.

DURESS. — REFUSAL ON DEMAND to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress, if the debtor has done nothing unlawful to cause the financial embarrassment which compelled him to submit to the extortion.

DURESS OF PROPERTY. — UNDER AN AGREEMENT to convey a perfect title to certain property, the grantor gave a quitclaim deed, which the grantee accepted; an unfounded claim to the same property was then made by a third party, and voluntarily bought up by such grantee. At this time the grantor was a depositor in the grantee's bank, and the latter, by refusing to honor his checks, compelled him, in a settlement between them, to pay part of the money paid to such third party by the grantee, thus causing what constitutes a duress of the grantor's property, and making the settlement void, because the acceptance of the quitclaim deed by the grantee was a waiver of a covenant against encumbrances, and all right to repayment of any part of the sum paid such third party.

BANKS. — MONEY DEPOSITED IN BANK in the ordinary way is money loaned to the bank, with the superadded obligation that it is to be paid when demanded by check.

ACTION for an accounting. The contract of January 24, 1881, mentioned in the opinion, is in substance as follows: Adams agreed to sell to Schiffer an undivided one-half interest in the mining property known as Summit lode and mill-site, which he agreed to relocate under the name of Aztec lode and mill-site, if advisable so to do, and that the terms of this agreement should apply equally to either name. The consideration named was three thousand five hundred dollars, of which fifteen hundred dollars was to be paid in cash at once, and the other two thousand dollars when Adams executed

and delivered to Schiffer good and sufficient deed and title to the property; that when the whole property shall be sold by consent for forty thousand dollars, or when Schiffer's interest shall sell for twenty thousand dollars, he will at once pay Adams six thousand dollars, Schiffer to furnish five thousand dollars as needed to work and develop the property, said five thousand dollars to be repaid out of any proceeds arising from the property in any manner. In the March following said contract, Adams sold to one Forsch one eighth of his remaining interest in said property for two thousand five hundred dollars, two hundred and fifty dollars paid down, the remaining two thousand two hundred and fifty dollars to be paid on or before June 1, 1881, or as soon thereafter as perfect title deed could be given, to consist of good warranty deed, or duplicate receipt for a United States patent to said property. On June 15, 1881, Adams gave Schiffer a quitclaim deed for a half-interest in the property, under the name of Aztec, and received the remainder of the purchase-money, two thousand dollars. Adams tendered Schiffer, as representing Forsch, at the same time, a deed for the interest sold him in March. Schiffer refused to receive the deed and pay the remainder of the purchase-money, two thousand two hundred and fifty dollars, claiming fraud on the part of Adams, which the latter denied. Schiffer offered to receive the deed, and pay one thousand seven hundred and fifty dollars for a receipt in full of the remaining purchase-money. Adams finally accepted, took the money, and delivered the deed. On this transaction, Adams claims five hundred dollars as the remainder of the unpaid purchase-money. On October 18, 1881, Adams agreed to sell to Schiffer, and to convey to him, by good and sufficient deed, his remaining interest in the property for twenty-five thousand dollars, to be deposited in Rio Grande County Bank to his credit on or before November 15, 1881. Adams went to New York, in response to a telegram from Schiffer, for the purpose of closing a sale of the property, and on November 17, 1881, sold and conveyed his remaining interest in the property to one Stern, by quitclaim deed, for fifteen thousand five hundred dollars, which sum Schiffer, who negotiated the sale, represented to Adams as all he could get. Adams was reluctant to sell for that sum, which was paid to Schiffer by Stern, Schiffer, before paying it to Adams, insisting that the latter should pay him his share of money advanced by him to work and develop the mine, amounting to six thousand eight hun-

dred dollars. Adams was willing to pay his share of the money so advanced over five thousand dollars, but insisted that under their agreement Schiffer was to advance five thousand dollars for such purpose, and to be reimbursed out of the proceeds arising from working the mine. Schiffer insisted that his reimbursement was to come out of the proceeds of the mine, arising from whatever source. Adams finally acceded to Schiffer's terms, delivered the deed, and accepted the fifteen thousand five hundred dollars, less the amount claimed by Schiffer for working and developing the mine. On this transaction Adams claims two thousand nine hundred dollars. In March, 1882, R. O. Adams, son of the complainant Adams, set up claim of title to the property sold by his father, and entered protest against the issuance of patent to him therefor. The facts and result of this transaction, together with all other necessary facts to a correct understanding of the opinion, will be found therein.

Hugh Butler, F. D. W. Youley, and Frank Naylor, for the plaintiff in error.

Markham, Patterson, and Thomas, for the defendant in error.

ELBERT, J. The complainant, Adams, prays for an account, and for a reconveyance of the Aztec mine and Aztec mill-site. We consider first the case made on the pleadings and evidence against the defendant Schiffer. The complainant alleges that he was the owner of the mining property in question; that it was of great value; that the defendant Schiffer knew this, and desired to purchase an interest in it; that the complainant was embarrassed financially, and unable to work the mine advantageously; that the "defendant was possessed of considerable money and property, and claimed to have a considerable acquaintance and influence among moneyed men in the city of New York; that if he could acquire an undivided one-half interest in the property, he would assist in opening and developing the property, and in that manner greatly enhance and increase the value of the remaining half of the property retained by the complainant; that by the aid and influence of the defendant among his moneyed friends and acquaintances in New York, after said property had been opened and developed, he could sell the remaining half-interest in said property, or some portion thereof, for a very large sum of money, so that the complainant could in a short time realize a fortune

in ready money by the sale thereof"; that the plaintiff, believing and relying upon said representations, made with the said Schiffer the contract of sale of January 24, 1881. With respect to this contract of sale there is no allegation of fraudulent representations. The only allegation which we find in the bill is in the fourteenth paragraph, and is one of fraudulent intent, namely, that the defendant "entered into said contract with the intent to deceive and defraud plaintiff."

The theory upon which plaintiff seeks to recover is thus more fully stated by his counsel: "The primary purpose is made plain by the after conduct of the defendant Schiffer. That he has oppressed, coerced, and impoverished plaintiff at every turn throughout the whole transaction, after his purchase of one-half interest, cannot be denied; and from this conduct the inference appears to us to be irresistible that the defendant Schiffer made the original purchase of the half-interest for the purpose of getting a hold upon the property, and enabling himself to practice the wrongs and oppressions which he has practiced upon the plaintiff. From this, and what Schiffer did in the end, the conclusion cannot be escaped that he made the promise to use his influence with his friends to sell plaintiff's remaining interest, and to pay plaintiff the six thousand dollars, with the fraudulent intent not to keep the one or to perform the other; with the purpose not to carry out the arrangement, but to make use of the situation which he would gain through the arrangement to get the title to the property in the end, in exact accordance with what he has shown by the evidence to have accomplished through coercion, intimidation, and duress." The defendant Schiffer's representations as to his influence in New York, and his ability to sell, were general. He did not undertake to sell at any sum, much less for any definite sum. He engaged to expend a certain sum in developing the mine; this he did. His demand for reimbursement will be hereafter considered. It does not appear that his representations respecting his influence were false, or that he failed to make the promised effort to sell. He did effect a sale of the remaining interest of the complainant at figures which the complainant voluntarily accepted, although the price did not meet his expectations. There is no evidence that Schiffer could have sold the property for a larger sum, or that he did not make due effort to that end. Had his representations, however, been false, and had he failed to effect a sale, it would not have necessarily

been a ground for the relief asked. "A misrepresentation goes for nothing, unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place": Kerr on Fraud and Misrepresentation, 84; *Larimer County Land Improvement Co. v. Cowan*, 5 Col. 324. While Schiffer's representations as to his influence in making the sale may have been a motive influencing the complainant in making the contract of January 24th, it cannot be said, in view of the conflicting testimony, that it definitely formed a part of the consideration, or that it was the proximate and immediate cause of the transaction. The distinct allegation of the bill, however, is, that in entering into this contract of the 24th of January there was upon the part of the defendant Schiffer an intention to defraud,—not an intention to defraud in the transaction of that date, but an intention to defraud thereafter, as explained by counsel, in future dealings with the property. It is claimed by the counsel for the complainant that this intention was pursued and consummated by the sale to Forsch in March, the settlement in respect thereto of the 15th of June, the subsequent sale of all the complainant's remaining interest to Stern on the 17th of November, the settlement of that date with respect to the money advanced by the defendant Schiffer for working and developing the mine, and the subsequent and final settlement of August 1, 1882. With respect to this proposition, we think it is sufficient to say that the mere intent upon the part of the defendant Schiffer to defraud the complainant in some future transaction could not affect their contract of the 24th of January, which was otherwise unimpeachable.

These subsequent transactions which we have mentioned must stand each upon its own merits. If the complainant was defrauded by any one or all of them, it cannot operate to affect or invalidate a prior, independent contract, made, entered into, and executed for a good and valuable consideration. A fraud must relate to facts then existing, or which had previously existed; hence non-performance of a promise made in the course of negotiations is not of itself either a fraud or the evidence of a fraud: Cooley on Torts, 474-486. It is true, this rule does not obtain in a class of cases where the promise is the device resorted to to accomplish the fraud,

as where one buys property, real or personal, with the existing intention not to pay for it: *Id.* 487; *Dowd v. Tucker*, 41 Conn. 205; *Dow v. Sanborn*, 3 Allen, 182; *Richardson v. Adams*, 10 Yerg. 273; *Gross v. McKee*, 53 Miss. 538. It is difficult to bring the case at bar within this class of cases. The deferred payment of two thousand dollars was paid by Schiffer when due. The subsequent wrongful demand to be released from the contingent payment of the six thousand dollars, like a failure to pay, is not of itself evidence of an original fraudulent intent. Taken in connection with his entire conduct in his dealings with the plaintiff, it is perhaps cumulative evidence that the defendant was a hard and exacting dealer; but to treat it, even when thus supported, as evidence of an original fraudulent intent sufficient to invalidate the several contracts between the plaintiff and defendant of a year and eighteen months before, would be to place the validity of contracts and conveyances upon very uncertain grounds. We are of the opinion, therefore, that the complainant is not entitled, as against the defendant Schiffer, to reconveyance of the one-half interest sold to him. Still less is the complainant entitled to this relief as against the defendants Forsch and Stern. There is no evidence to support the allegation of conspiracy between them and the defendant Schiffer, or to show that they were other than innocent and *bona fide* purchasers.

We now proceed to the consideration of the three several settlements made by the complainant and defendant, of the 15th of June and of the 17th of November, 1881, and of the 1st of August, 1882, with respect to which the complainant demands relief upon the ground that they were made under duress of goods. Contracts made and money paid under duress of goods have been held, the former void and the latter recoverable, in many well-considered cases both in England and America. The decisions are not uniform in their expression of the law, but they all rest upon the proposition that the duress of property was such as to render the contract or payment involuntary. It seems to be well settled that where a party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made or money paid by the owner under such circumstances, to emancipate the property, is to be regarded as made under compulsion. The case of *Astley v. Reynolds*, 2 Strange, 915,

is regarded as the leading English case. There a pawnbroker refused to deliver goods pawned, except upon payment of excessive interest. The owner having paid this to obtain possession of his property, he was allowed to recover back the excess: See also *Smith v. Bromley*, 2 Doug. 696. The refusal of common carriers to deliver goods without payment of excessive charges has given rise to numerous cases in which the principle has been applied: *Ashmole v. Wainwright*, 2 Q. B. 837; *Harmony v. Bingham*, 12 N. Y. 99; 62 Am. Dec. 142; *Tutt v. Ide*, 3 Blatchf. 249; *Beckwith v. Frisbie*, 32 Vt. 559. The exaction of illegal taxes and tolls constitutes another class of cases in which recovery has been allowed upon the same principles: *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School District*, 57 Pa. St. 433; *Preston v. Boston*, 12 Pick. 14; *Elliott v. Swartwout*, 10 Pet. 138; *Ripley v. Gelston*, 9 Johns. 201; 6 Am. Dec. 271; *Chase v. Dwinal*, 7 Me. 134; 20 Am. Dec. 352; *Amesbury etc. Mfg. Co. v. Amesbury*, 17 Mass. 461. So, too, where the duress has been by means of legal process, money paid to release property so held is recoverable: *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Crawford v. Cato*, 22 Ga. 594; *Collins v. Westbury*, 2 Bay, 211; 1 Am. Rep. 643; *Chandler v. Sanger*, 114 Mass. 364; *Bank v. Watkins*, 21 Mich. 483. Money wrongfully exacted by a corporation as a condition precedent to a transfer of stock was held recoverable in the case of *Bates v. Insurance Co.*, 3 Johns. Cas. 238. Illegal commissions demanded and paid to secure the surrender of bonds were held recoverable in the case of *Scholey v. Mumford*, 60 N. Y. 498. Money paid in order to obtain a transfer of patents wrongfully withheld was held recoverable in the case of *White v. Heylman*, 34 Pa. St. 142. In the case of *Vyne v. Glenn*, 41 Mich. 112, the duress consisted in an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due him from such other debtors.

Mr. Greenleaf states the general doctrine thus: "Under this count [*indebitatus assumpsit*] the plaintiff may recover back money found to have been obtained from him by duress, extortion, imposition, or taking an undue advantage of his situation, or otherwise involuntarily and wrongfully paid, as by demand of illegal fees, or claims, tolls, duties, taxes, usury, and the like, where goods or the person were detained until the money has been paid": 2 Greenl. Ev., sec. 121. Mr. Cooley says: "Duress of goods consists in seizing by force, or

withholding from the party entitled to it, the possession of personal property, and extorting something as the condition for its release, or in demanding and taking personal property under color of legal authority, which in fact is either void, or for some other reason does not justify the demand": Cooley on Torts, 507. What shall constitute duress of goods, as a question of fact, is often difficult to determine, and in its determination we are constantly confronted with the maxim, *Volenti non fit injuria*,—"an injury cannot be done to a willing person." Or, as more pointedly put, "if a person consent to a wrong he cannot complain."

Counsel for complainant insist upon the application of the principle of duress of goods to the three several and separate transactions between the complainant and defendant, which we have mentioned under their respective dates. As to the settlement of June 15th, respecting the Forsch sale, the principle involved has no applicability. Schiffer, as the agent of Forsch, charging Adams with certain false representations, refused to pay him the contract price for the interest sold by Adams to Forsch, whether justly or not we need not inquire. Adams was entirely free to accept or reject the smaller sum offered by Schiffer by way of compromise. He says: "I wanted the money, and he would not pay more, and I took it rather than lose the sale. . . . Refusal on demand to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress, if the debtor has done nothing unlawful to cause the financial embarrassment which compelled him to submit to the extortion": *Hackley v. Headley*, 45 Mich. 576. The evidence discloses no ground for saying that Adams, at the time, was financially embarrassed in any special or extraordinary manner, or, if he was, that Schiffer was in any way the cause of his financial embarrassment.

Nor can the settlement of the 17th of November be regarded as made under duress of goods. It is true that Schiffer claimed that Adams should reimburse him, or secure to him what he claimed as Adams's share of the money expended in the development of the mine, and this doubtless with a view of inducing Adams to accept the fifteen thousand five hundred dollars offered by Stern for Adams's remaining interest in the mine. Schiffer was doubtless pushing him, but it was Adams's duty to resist if the demand made by Schiffer was unjust. He was entirely free to refuse either to make the sale to Stern or

to secure Schiffer's claim upon the mine. Schiffer had no control or possession of Adams's property.

The claim for reimbursement was made, according to Adams's testimony, pending negotiations for the sale to Stern, and with a view, as he says, of coercing a sale. Upon Adams refusing to make the sale to Stern for the sum offered, he says: "We figured up this thing that I owed him upon the expenses for work." Adams says he offered him security on the ores to be taken out of the mine; but Schiffer refused, and wanted security on Adams's remaining interest in the mine, in case he refused to sell to Stern. Rather than thus place himself in Schiffer's power, he says he sold for fifteen thousand five hundred dollars. It is true that Adams, in his testimony, says: "When he [Schiffer] came to pay me he said: 'I am going to take out what you owe me.' The deed was signed, and I could not help it." He does not say, however, that the deed had passed from his control or possession to that of Schiffer, or that he demanded its return from Schiffer, or that Schiffer refused to return it. Moreover, even on this state of facts, did they exist, the question would still remain as to the lawfulness or the unlawfulness of Schiffer's demand. But the gist of Adams's testimony is to the effect that he made the sale with the full understanding that Schiffer would demand reimbursement out of the proceeds of the sale of an amount "figured up" and ascertained before the sale. That he yielded to the pressure brought to bear by Schiffer because he needed the money, is no ground for holding either the sale or the settlement void. Sales and compromises and contracts under stress of pecuniary needs are of daily occurrence; and if such stress is to affect their validity, "no one," in the language of Justice Cooley, "could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need": *Hackley v. Headley*, 45 Mich. 577.

The evidence touching the settlement of the 1st of August following presents a much closer question. In the month of April preceding, Adams had been notified by Schiffer that his checks against his deposit at the Rio Grande County Bank would not thereafter be honored until the matter of his son's claim of title to the mining property was settled. The bank appears to have been under the control of the defendant and his brother, Abraham Schiffer, under the firm name of H. Schiffer and Brother. Adams had, at the time, about eight

thousand dollars on deposit at the bank, subject to his check. After receiving this notice from defendant, upon application by Adams to the bank for his money, Abraham Schiffer told him he did n't dare to let him have it without the consent of his brother. The refusal to let Adams draw on his money at the bank was peremptory and absolute, except for "enough to live on." Thus the matter stood until the settlement of the 1st of August. In the mean time Adams had addressed himself to the matter of his son's claim of title to the mine, and had obtained a deed from his son to Schiffer, the consideration being ten thousand dollars, which was paid by the defendant. He had also obtained a deed from the administrator of the estate of his deceased wife, at Schiffer's request. With respect to this claim of title of the son of Adams there does not appear to be any foundation for the charge that father and son were acting in concert for the purpose of compelling defendant Schiffer to pay a further sum of money for the mine. The son seems to have been undutiful, and beyond the control or influence of the father. Some time prior to 1874, the complainant had given the son what is called a bill of sale of the mine, and had taken back a power of attorney to himself, dated February 19, 1874, and recorded May 6, 1874. This power of attorney was afterwards revoked by the son, at what date the record does not disclose. The bill of sale to the son was without consideration, and made for the purpose of putting the property beyond the reach of certain divorce proceedings instituted by the wife of Adams, but afterwards discontinued. There is nothing to show that it was a conveyance, either in form or effect. Schiffer had obtained an abstract of title from the county clerk's office prior to his purchase from Adams in January, 1881, and had full knowledge of its condition at the time of his purchase. His contract with Adams of the 24th of January, for the one-half interest, calls for a good and sufficient deed of conveyance, "passing to the said Schiffer a good and perfect title to the said above-described property."

On the 15th of June following, after Adams had made his relocation and entry of the mine and mill-site, under the name of the Aztec, Adams, in pursuance of this contract, conveyed to Schiffer the one-half interest by a deed of quitclaim, without covenants. Schiffer must be taken to have accepted this deed as a full compliance with and discharge of the contract of January 24th. Forsch's contract with Adams, of the

21st of March, for one-sixteenth interest in the mining property, called for a "good warranty deed as soon as a duplicate receipt for patent is issued from the United States land-office." On the 15th of June, Adams, in pursuance of his contract, conveyed to Forsch this one-sixteenth interest by deed of quitclaim, without covenants, and delivered it to Schiffer as Forsch's agent. This also must be taken as having been accepted in full discharge of his agreement of the 21st of March. The conveyance by Adams to Stern, under the date of November 17th, is by ordinary deed of quitclaim, but with the covenant added: "And the said party of the first part, for the consideration above stated, does hereby covenant and agree with the said party of the second part that he has full right and power to sell and convey the said premises, and that said premises are now free and clear from all encumbrances, sale, or mortgage, made or suffered by the said party of the first part." These covenants were broken at the time of the conveyance, if broken at all: Willard on Real Estate, 413. The covenant of right to convey amounts to a covenant of seisin; they are synonymous. The principles and practice applicable to the one apply to the other: 3 Washburn on Real Property, 448; Willard on Real Estate, 415; *Rickert v. Snyder*, 9 Wend. 421. There was no breach of this covenant, as at the time of the conveyance Adams was in possession of the property conveyed, and had a right to convey, within the meaning of the covenant: 3 Washburn on Real Property, 449. Nor can we say that there was breach of the covenant against encumbrance and sale. An existing, outstanding, paramount title is held to constitute a breach of the covenant against encumbrances: 3 Id. 461; *Cornell v. Jackson*, 3 Cush. 506. But the claim of title made by R. O. Adams does not appear to have been of any such substantial character. What is called a bill of sale to him from his father is not set forth in the record. So far as we can see, his claim was without any foundation in law. He does not appear to have ever been in possession of the mining property, nor to have taken any of the steps necessary under the law to perfect or preserve title. What little evidence we have on the subject goes to show that the property was subject to relocation by the complainant, and that the title he gave was good. Afterwards, Adams, on his own behalf, and as attorney in fact for his son, R. O. Adams, executed and delivered to Schiffer a quitclaim deed for the entire property. This deed is dated November 17, 1881, but is ac-

known February 14, 1882, and was made in compliance with a request of Schiffer contained in his letter of January 22, 1882. He writes: "I had abstracts sent east, but since I am here, a party wishes also a quitclaim deed signed by you, as attorney for R. O. Adams, as it cleans up all interest or pretended interest in the former location. I therefore inclose you quitclaim deed for you to sign. There is no value attached; only matter of form." This deed likewise is without covenants, and Adams testifies that Schiffer, at the time, knew that R. O. Adams had theretofore revoked his power of attorney to his father. Schiffer does not contradict this statement.

In view of the facts, we do not see that Schiffer had any legal ground for his claim that Adams was bound to protect him and his associates, Forsch and Stern, against the claim of title made by the younger Adams. But whatever the rights of Schiffer under the several contracts and conveyances, he must be held to have waived them, if they existed. After much dispute in respect to the matter, Schiffer distinctly announced to Adams that he himself was willing to pay ten thousand dollars for a quitclaim deed from his son. It was upon this reiterated proposition that Adams addressed himself to the work of securing his son's deed. He says in his testimony: "Mr. Schiffer said: 'If you accomplish a settlement, and he [the son] will give me a quitclaim deed, I will give him ten thousand dollars.' I said: 'I don't know anything more about that boy than you do. He has been nothing to me for four years; but I will do what I can.' . . . After he said he would help, I went to work with a determination to accomplish it. I never admitted the title of my son to Mr. Schiffer. I went to work negotiating with my son by letter and telegraph, and at last he agreed to relinquish all claims to Mr. Schiffer by giving a quitclaim deed for ten thousand dollars." There can be no doubt upon this point, accepting the testimony of the defendant Schiffer himself. In the postscript to his letter under date of June 16, 1882, he writes: "You certainly can't expect me to pay ten thousand dollars without seeing the deeds, and getting everything satisfactorily arranged, after agreeing to pay this sum without owing a cent for it; but I will not fail upon my word, and will pay for deeds satisfactory all around, so there will be no more hereafter. I want you plainly to understand, if I agree to do anything I never fail, except by accident or death." "Q. What do you mean when you state in your letter—I have

forgotten the date of it—that you would pay ten thousand dollars? Did you mean, when you said that, that Dr. Adams was to pay any part of that ten thousand dollars? A. I agreed to pay ten thousand dollars. Q. Did you tell Dr. Adams at that time that he was to pay his proportion of that ten thousand dollars? A. I did not say so at that time. . . . When I made the ten-thousand-dollar proposition to Dr. Adams, I authorized him to make the proposition to his son, and I said in case he brought it about, I would pay ten thousand dollars. Q. When you made that proposition, did you tell him, in any way, shape, or manner, that he would be required to pay any part of that ten thousand dollars? A. I did n't. Q. Did you not give him to understand that you would pay that ten thousand dollars yourself for the sake of having the matter settled? A. Yes; I told him I would pay it to have the matter settled." Again, he says: "I told Mr. Adams then, in order to have this thing settled, the best I would do, and all I would do, was, I would give him ten thousand dollars, although I don't know your son, and I consider it your business to defend it." After having obtained this deed from his son, and also a deed from the administrator of his deceased wife, Adams went to the bank of defendant on the first day of August, 1882, for the purpose of settlement. Whether the defendant snatched the administrator's deed from the hand of the complainant or not is immaterial; he admits that he refused to return it to Adams, and took it and put it on record. He then for the first time tells Adams that he was to reimburse him the ten thousand dollars paid to the son. He says: "I had it recorded, and then I went back to the bank, and found Mr. Adams there, and Mr. Keyser [cashier] was there also. I asked Mr. Keyser how much was due Mr. Adams. Mr. Keyser looked up the books, and found between six thousand three hundred and six thousand four hundred dollars,—\$6,437.34. I told Mr. Adams I had an offset; 'I have an offset against you of ten thousand dollars that I paid your son, which I had no business in the world to pay. It was for you to settle; it was a suit brought by your son against you, but you did not do anything towards it. I had to bear it, and I want you to stand it.' . . . He wouldn't submit to it. I says, 'I will tell you what I will do, and that is all I will do; if you stand two thousand five hundred dollars out of this ten thousand, and release me from the payment of the six thousand I was to pay you according to our

contract at any time I shall sell the property for forty thousand dollars, or my half for twenty thousand dollars, we will settle right here.' I says, 'If you ain't satisfied with that you can sue, but that is the best I will do.' He asked me to put it down on a piece of paper what I was willing to pay. I says, 'All right, it is in black and white; we have some six thousand four hundred dollars due you; you take off two thousand five hundred dollars, which will leave a balance of three thousand nine hundred and some odd dollars, and you discharge me from paying that six thousand.' It was all on a piece of paper, and I think he took that paper. He says, 'Is that the best you will do?' and I said, 'Yes.' He said, 'I will see you later,' and left the bank. . . . Some time about two o'clock Mr. Adams came back to the office, and says, 'Now, Herman, let us settle this matter; I have had enough of this trouble; I want my money.' I told him that his money was ready. He looked at the paper he had, and said, 'Now, can't you make this an even sum of four thousand dollars.' I says, 'No, I can't; but if you want to accept this you can do so.' He studied a while and said, 'I suppose I am satisfied with it.' . . . I went out and called Mr. Wilson, and told him that we had settled. . . . Mr. Wilson went out, and in an hour or so came back and brought the papers to the office, and read us the settlement papers. . . . Mr. Wilson read both of them to Adams. Adams made no objection; he signed them. I gave him a receipt in full, and he accepted it. That finished everything, except some small accounts, which were not settled in that."

The refusal of Schiffer to allow Adams to draw on his money in bank, his agreement to pay ten thousand dollars for his son's deed, his subsequent refusal to pay it after getting the deed in his possession, and the demand that Adams should pay it, was a clear attempt to perpetrate an unmitigated fraud. Adams did not admit any title in his son, or, if it existed, that he was called upon to defend it; nor is it to be presumed that he ever would have submitted to the final demand made by Schiffer but for the control which Schiffer had over his money on deposit with the firm of H. Schiffer and Brother. Money deposited with a banker by a customer in the ordinary way is money lent to the bank, with the superadded obligation that it is to be paid when demanded by check: Ball on National Banks, 83. The money deposited by Adams, and withheld from him, was due him, not from the defendant

Herman Schiffer, but from the banking firm of H. Schiffer and Brother. The defendant's control and influence in the business matters of the firm were such as to control the firm in its action in this matter. It was, therefore, not a mere withholding of a debt due from himself, but an unlawful interference between the plaintiff and other debtors, by means of which he stopped the payment to plaintiff of sums due him; and presents a case analogous to that of *Vyne v. Glenn*, 41 Mich. 112, reviewed by Mr. Justice Cooley in the case of *Hackley v. Headley*, 45 Id. 577. We are of the opinion that the settlement of the 1st of August was clearly made under duress of property, and must be held null and void.

The court erred in dismissing the bill. The views expressed preclude a recovery in respect to the matters embraced in the settlements of the 15th of June and the 17th of November. Upon some, if not all, of the remaining issues made by the pleadings, we are of the opinion that both complainant and defendant should have an opportunity to introduce further evidence, if they should be so advised. We do not, therefore, direct a decree, but remand the cause for further proceedings. The decree of the court below is reversed.

FALSE REPRESENTATIONS TO AVOID CONTRACT: See *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Clem v. Newcastle etc. R. R. Co.*, 9 Ind. 488; 68 Am. Dec. 653, and notes to these cases; *Barnard v. R. Iron Co.*, 85 Tenn. 139; *Runge v. Brown*, 23 Neb. 817. As to whether false representations as to future events will vitiate the contract, see *Henderson v. San Antonio etc. R. R. Co.*, 17 Tex. 560; 67 Am. Dec. 675, note 685.

FRAUD WHICH IS INDEPENDENT OF TRANSACTION does not vitiate it: *Emerson v. Smith*, 51 Pa. St. 90; 88 Am. Dec. 566; *Blair v. Buttolph*, 72 Iowa, 31, and cases cited; *Burns v. Mahannah*, 39 Kan. 87.

DURESS OF PROPERTY, WHAT CONSTITUTES, and law relating to: *Chamberlain v. Reed*, 13 Me. 357; 29 Am. Dec. 506; note to *Hatter v. Greenlee*, 26 Id. 374, 376; *Alston v. Durant*, 2 Strob. 257; 49 Id. 596; note to *Mayor etc. v. Lefferman*, 45 Id. 160; *Claflin v. McDonough*, 84 Id. 54, and note; *Chandler v. Sanger*, 19 Am. Rep. 367, and foot-note.

DEPOSIT. — RELATION CREATED THEREBY between banker and depositor is that of debtor and creditor: *Gumbel v. Abrams*, 20 La. Ann. 568; 96 Am. Dec. 426; *Marine Bank v. Chandler*, 27 Ill. 525; 81 Am. Dec. 249, and notes to these cases; *Lynch v. First Nat. Bank*, 107 N. Y. 579; 1 Am. St. Rep. 803; with an implied promise on the part of the banker to pay on the checks of the depositor: *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146, and note 157.

REPRESENTATIONS RESPECTING FUTURE EVENTS, OR THINGS TO BE DONE AT A FUTURE TIME, cannot be true nor false when made, hence cannot be enforced unless they amount to a contract: *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; nor can such representations be relied upon as creating an estoppel: *McLain v. Bulliner*, 49 Ark. 218; 4 Am. St. Rep. 36, and note 41.

CHEVER v. HORNER.

[11 COLORADO, 68.]

PUBLIC LANDS — DEED TO TOWN SITE BY PROBATE JUDGE. — Execution and delivery of a deed to a town site by a probate judge, acting under and by virtue of the United States and territorial town-site statutes, is analogous to the granting of a patent by the governmental land department, and the same presumptions that exist in favor of the latter also exist in favor of the former. Neither can be impeached collaterally, nor the regularity of the proceedings anterior to its issue called in question in an action of law, where there was jurisdiction to dispose of the land.

PUBLIC LANDS — COLLATERAL ATTACK ON PATENT. — Where the officers of the government land department, while acting within the limits of their jurisdiction in issuing a patent, err in respect to their duty as to question of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if upon any state of facts the patent might have lawfully issued, and as against such collateral attack the existence of such necessary facts will be presumed. Parties aggrieved must resort to direct proceedings to set aside such patent. The same rule applies to a deed executed by a probate judge acting under and by virtue of the United States and Colorado territorial town-site statutes.

PUBLIC LANDS. — DEED EXECUTED BY PROBATE JUDGE assuming to act under and by virtue of the United States and Colorado territorial town-site statutes, reciting that entry and conveyance were made under and by virtue of and in accordance with such statutes, and that the grantee therein is entitled to the land as the rightful occupant, and also as the owner of the improvements thereon, is sufficient to raise a presumption, in an action of ejectment by a subsequent grantee from another probate judge, that the necessary initiatory steps were taken in conformity with law. Nor is the deed open in such action to attack for defects or omissions in such initiatory proceedings.

JUDGMENT. — IRREGULARITY IN FORM OF JUDGMENT which is not prejudicial to the appellant cannot be complained of as error.

EJECTMENT by Chever against Rogers and Horner. Plaintiff alleged that Rogers wrongfully withheld possession, and that Horner claimed title adversely to plaintiff. Rogers answered, denying that plaintiff was seised of any estate in the land. Horner answered, claiming title in fee-simple in himself, that Rogers was his tenant, and denying the rights claimed by plaintiff. The replication was a denial of Horner's claim of title. The land in dispute was part of the original town site of the city of Denver, entered by James Hall, probate judge, May 6, 1865, under and by virtue of acts of Congress of May 23, 1844, and May 28, 1864, "in trust for the several use and benefit of the rightful occupants and *bona fide* owners of the improvements." Plaintiff proved that he filed on the land in question, in the office of the probate judge, on August 7, 1865, and introduced a deed to the land from W. C. Kingsley,

probate judge, to himself, dated May 8, 1875. Horner introduced a deed to the same land from one Downing, probate judge, to John Hughes, dated October 24, 1867. Also a deed from Hughes to himself of an undivided half of said land, dated November 26, 1870. Also a district court decree in partition, entered in April, 1877, vesting the other undivided half of said land in him. Plaintiff offered to prove that Hughes never filed upon the land as required by law; that at the time the deed was executed to him there were two filings upon the land, one by plaintiff, the other by one Veasey; that defendant was not a beneficiary under the acts of Congress aforesaid, nor an occupant, nor entitled to possession, nor had any improvements; that on May 23, 1873, plaintiff was in possession; that defendant broke down a fence, moved a frame house upon the land, and took possession. These offers of proof were rejected. The act of Congress of May 23, 1844, authorized the entry of town sites, in trust for the use and benefit of occupants, and required the trust to be executed as to the disposal of lots, and the proceeds and sales thereof, in accordance with regulations prescribed by the legislature of the state or territory in which the land was situated, and also provided that any act of trustees not in conformity with such regulations should be void. The act of Congress of May 28, 1864, related especially to citizens of Denver, and extended the provisions of the previous act to specific subdivisions of land, and provided that its provisions should be controlled by the previous act, and rules and regulations of the general land-office. The Colorado territorial act approved March 11, 1864, prescribed rules and regulations for the execution of the trust arising under the former act of Congress, and by operation of law they were equally applicable to entries made under the later act.

J. Q. Charles and H. C. Dillon, for the appellant.

J. W. Horner and Lucius P. Marsh, for the appellees.

BECK, C. J. In construing the foregoing statutes this court has held that the execution and delivery of a deed to a portion of the Denver town site, by a probate judge, acting under and by virtue of these statutes, was analogous to the granting of a patent by the land department of the government, and that the same presumptions in favor of the regularity of such deed exist as in the case of a patent issued by the government. It has long been a settled doctrine that a

government patent cannot be impeached collaterally, nor the regularity of the proceedings anterior to its issue called in question in an action at law, where the land department of the government had jurisdiction to dispose of the land. The adjudications of the supreme court of the United States upon this point are reviewed in *Anderson v. Bartels*, 7 Col. 256, a case substantially similar to that here presented, and which we think conclusive of most of the questions raised by the assignment of errors in this case. It was there held that the conclusive presumptions attaching to a patent were applicable to the deed of a probate judge, assuming to act under and by virtue of the United States and territorial town-site statutes. One of the positions assumed by appellant's counsel is, that the present case should be distinguished from the *Anderson* case, because its essential facts are different, and for the reason that the questions of law involved did not arise in the former case. We reply that the controlling legal proposition is the same in both cases, viz., Can the prior deed executed by the probate judge be collaterally impeached by proof that certain preliminary requisites of the law have not been complied with? In the former case this question was determined in the negative. Why should it be determined differently in the present case? The principal reasons assigned are, that the deed sought to be impeached in the former case, that from Probate Judge Downing to Foy (through which, by mesne conveyances, defendant Caroline E. Downing deraigned title), was based upon a filing made in accordance with the territorial act of March 11, 1864, while no such proof was made in support of the Hughes deed in the present case; and plaintiff offered to show that no filing had been made by Hughes. While the fact that Foy had made such filing was disclosed by the record in the former case, it was not a controlling fact in the decision. The doctrine announced was, that the deed upon its face purported to have been issued in pursuance of the law, and was therefore only assailable in a direct proceeding to set it aside. Another proposition insisted upon is, that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is: "That the action of Downing in issuing the deed in question to Hughes was a fraud upon the rights of the plaintiff in this case will hardly be questioned." Whether

this charge be true or not, the proposition that upon this ground the validity of the deed was examinable, in an action of this character, is in conflict with the leading cases on the subject.

The doctrine is established by numerous decisions of the supreme court of the United States, that, should the officers of the land department, in issuing a patent, err in respect to their duty or as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if, upon any state of facts, the patent might have lawfully issued; and that against collateral attack it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent: *Smelting Co. v. Kemp*, 104 U. S. 636; *Johnson v. Towsley*, 13 Wall. 72-83; *Moffatt v. United States*, 112 U. S. 34.

It is held in *Field v. Seabury*, 19 How. 323-333, that when a patent has issued without any provisions incorporated for inquiring into its fairness as between grantor and grantee or between third parties, a third party cannot raise, in ejectment, the question of fraud as between the grantor and grantee, and thus look beyond the patent. This case declares that a patent cannot be collaterally avoided at law for fraud, and that the court had never declared it could be done. A third proposition is, that the case comes within the two exceptions to the rule of conclusive presumptions mentioned in the *Anderson* case; the first being when there is a contest between two patentees for the same land, that a patent takes effect from the date of the original proceedings to obtain title, and in such case they are referred to for the purpose of ascertaining which of the contestants took the first steps; the other instance being under a statute declaring a patent void where no entry as an initiatory proceeding had been made.

These exceptions require explanation. In a contest between two patentees concerning the same tract of land, where the patents were issued by the land department of the government under the general land laws thereof, and the land in dispute was subject to entry and sale, the exception only applies to cases arising under certain state statutes which authorize such an inquiry into the prior equities in an action at law. It is not a general exception. The exception also applies in the earlier patent issued without jurisdiction, as if the land was not then the property of the United States, or was not open to entry and sale. Another exception, and the one upon which

the most of the cases cited by the appellant are based, relates to patents issued by the government for lands in California, under the treaty of 1846 with Mexico, and the congressional act of 1851, passed in aid thereof. This exception will be explained hereafter. As to the second class of exceptions, also arising under special statutes, the rule announced in the above-mentioned case was, if the patent is silent on the subject, it is competent to show the initiatory steps were not taken at all. The rule contended for under this third proposition is, that the filing upon a lot by a claimant, made in the office of the probate judge, in pursuance of the territorial act of March 11, 1864, was the equivalent of an entry of land in a government or state land-office; that as between conflicting claimants for the same lot, the party making the earlier filing, although holding the junior deed, is entitled to recover by virtue of the doctrine of relation, as "where two patents have been issued by the United States for the same property, and the junior conveyance, by relation, has been held to convey the superior and better title." When two patents for the same tract of land are issued by the government, while the first patent conveys the legal title, the second may convey the equitable and better title. But the courts of the United States do not hold that the equitable title shall prevail in an action at law, save in the excepted cases mentioned. It was so held in *Ross v. Barland*, 1 Pet. 655, but the reason assigned by the court was, that the cause originated in the state of Mississippi, where, according to the peculiar mode of proceeding in actions of ejectment, the courts "look beyond the grant, and examine the progressive stages of the title from its incipient state . . . until its final consummation by grant; and if found regular, and according to law, in these progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly." In such a case, the correctness of the practice, as established by the courts of the state, could not be examined on writ of error to the supreme court of the United States, as stated in the *syllabus* of the case. The court, however, said: "Upon common-law principles, the legal title should prevail, in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law." This case is therefore not in point, since the practice mentioned does not prevail in this state. The case of *Sherman v. Buick*, 93 U. S. 209, was a contest at law between two patentees who claimed the same tract of land, the plaintiff by

a patent from the United States, and the defendant by a patent issued by the state of California. The plaintiff held the junior grant, and it was held proper for him to introduce evidence of his prior entry, not for the purpose of impeaching or contradicting the state patent, but for the purpose of showing that when the state of California made her conveyance, she had no title to the land. This case, therefore, fell within another exception. The same character of testimony was held admissible, for the same purpose, in *Polk's Lessee v. Wendal*, 9 Cranch, 87, a case strongly relied upon by the appellant in the present action. The plaintiff's title rested upon a patent issued by the state of North Carolina, regular in all respects. The defendant relied upon an earlier patent issued by the same state, purporting to convey the same lands. The lands in controversy comprised a portion of a tract of territory which had been ceded by the state of North Carolina to the government of the United States many years prior to the issuing of either patent. At the time of the cession, the right was reserved by the state to perfect incipient titles. It did not appear on the face of the defendant's patent that an incipient title had accrued prior to the cession, and the state authorities had not jurisdiction to make a grant upon rights claimed to have accrued afterwards. On this point, the court say: "After the cession, the state of North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of that state": Page 284.

The patent in the above case purported to have been made by virtue of certain warrants founded on entries. The plaintiff offered to prove that these entries were never made, and that the warrants were forgeries. This evidence was excluded at the trial by the district court of the United States, but held to have been admissible by the supreme court, on the principle announced in both this and the previous case, that the object of the testimony was to show that the state had no title to the thing granted, and consequently acted without jurisdiction. If, as the court says, these warrants had no existence at the time of the cession, and no entries had been made, the grantee had no incipient rights. The patent being silent on this point, and there being a state statute requiring an entry to be made, and declaring void all patents issued in violation of its provisions, the case comes clearly within both classes of exceptions referred to in the *Anderson* case. These are the only classes of cases found by us where unconditional patents

have been held open to examination at law. The doctrine of relation, so earnestly insisted upon by counsel for appellant as applicable to the case before us, has frequently been applied in equity, and has likewise been applied under peculiar systems of procedure, as in the Mississippi case. There are other instances, however, than those above given, wherein it has been held proper, in contests between patentees for the same land in legal actions, to show "that a junior patent was founded upon an earlier entry than the older patent, and therefore passes the title." Most of the cases cited on part of the appellant have been of this character. These cases have arisen, as above stated, under treaty stipulations with Mexico, by virtue of which the territory embraced within the state of California was ceded to the United States, and under the act of Congress of March 3, 1851, passed to ascertain and settle the private land claims in that state. By the treaty of cession, the property rights of the inhabitants were to be protected to the same extent as under the former government. The act of Congress specified the manner and terms on which these treaty obligations would be discharged. All claims to land were to be presented, within two years from the date of the act, to a board of land commissioners for investigation, or to be treated as abandoned. The claims were to be supported by evidence furnished by the claimants, and government officers were to appear and contest on behalf of the United States. Appeals were authorized from the land board to the district court of the United States, and thence to the supreme court. Upon confirmation of a claim by this special tribunal, or on appeal, the land was to be surveyed and located, and upon approval of the survey by government officers, a patent issued from the United States to the claimant. As to the effect of the patent when issued, it was held to operate as a relinquishment to the patentee of all interest of the United States in the land granted thereby, and to be an official declaration that the claim was valid under the laws of Mexico, and entitled to recognition under the treaty stipulations. As to claims to these lands made by other parties after the cession of the territory to the United States, the patents are held conclusive, and to take effect by relation at the time proceedings were instituted before the board of land commissioners by the parties whose rights were acquired under the Mexican government. They are held to convey to the patentee the legal title, and to be conclusive in actions of ejectment as against all

persons asserting imperfect or equitable titles, or interests acquired after the cession of the territory. This class of patents, however, reserves the rights of "third persons," in accordance with the provision of the act of March 3, 1851, that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the rights of third persons. The third persons intended were held to be those whose rights were acquired under the former government.

We are of opinion that the adjudications of the state and federal courts, upon patents issued by the United States for lands in California claimed under Mexican and Spanish grants, do not furnish a correct rule for the interpretation of a deed to a parcel of land in the Denver town site executed by a probate judge, under and by virtue of the acts of Congress and of the territorial legislature relating to that subject. The statement in the Anderson case that a deed executed by the probate judge is analogous, in effect, to a patent granted by the government had reference to patents for lands of the United States issued by the land department under the public land laws of the government. The adjudications upon patents issued upon Mexican grants were necessarily variant from those made in cases arising under the public land laws. The laws, the principles involved, and the systems of procedure in the two cases are essentially different. In one case the patents, when regularly issued, are conclusive in actions at law of the rights of all persons. In the other, although the proceedings may be entirely regular, yet there is a reservation to those who may be able to show superior rights. For these reasons the latter class of cases cannot control the construction of conveyances of the character under consideration. The decisions in the former class, in so far as they relate to the effect and conclusive character of patents made under systems of procedure similar to our own, or in accordance with common-law principles, are recognized authority in the construction of these deeds. Under the acts of Congress above mentioned, and the provisions of the act of the territorial legislature in aid thereof, the probate judge, holding the title to the town site in trust for the beneficiaries, was authorized to convey the lots and parcels of land therein to those entitled to the same. This was a general jurisdiction over the subject-matter, analogous to the jurisdiction of the land department of the government over the issuing of patents to lands subject

to entry under the land laws of the United States. Being invested with title and jurisdiction, Probate Judge Downing conveyed the lot in controversy to John Hughes, from whom appellee, Horner, deraigned title more than seven years prior to the conveyance by his successor, Judge Kingsley, to the appellant, Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face, and purports to have been executed in pursuance of the authority vested in the grantor, it is not open to attack in this collateral proceeding for defects or omissions in the initiatory proceedings. Referring to the copy of the deed set out in the transcript, the deed itself is shown to contain the recitals of the entry of the town site by Probate Judge James Hall; that for more effectually carrying out the trust secured by the act of Congress, he conveyed by deed to his successor in office, Omer O. Kent, "all portions and lots of land not heretofore conveyed by him in accordance with said trust"; that said Omer O. Kent conveyed by deed to his successor in office, Jacob Downing, to effectuate the same purposes, "all portions and lots of land not heretofore conveyed by him in accordance with said trust." It also contains these further recitals: "And whereas, the said party of the second part is justly entitled to the lots and parcels of ground hereinafter described as the rightful occupant thereof, and the *bona fide* owner of the improvements thereon, under the provisions of said act of Congress; now, therefore, in consideration of the premises and the sum of one dollar by the party of the second part in hand paid to the said party of the first part, under and by virtue of the act of Congress aforesaid, and the laws of the territory of Colorado, the said party of the first part doth hereby grant and convey unto the said party of the second part," etc.

It is seen from these recitals that the deed is neither void upon its face nor silent as to the authority of the officer to execute it. They are sufficient, under the principles announced and the authorities cited in support thereof, to raise the presumption, in an action of this character, that the necessary initiatory steps were taken in conformity with the law.

Respecting the error assigned as to the form of the judgment, the irregularity complained of is in no manner prejudicial to the appellant.

The effect of the finding and judgment is, that in so far as this action is concerned, he had neither title nor right of possession. The judgment is affirmed.

PATENT ISSUED BY PROPER OFFICERS IS PRESUMED VALID, and is *prima facie* evidence of the regularity of all preliminary proceedings: *Schnee v. Schnee*, 23 Wis. 377; 99 Am. Dec. 183, and note 186; *Mayor etc. v. Eslava*, 9 Port. 577; 33 Am. Dec. 325; and in a court of law is conclusive: *Parkison v. Bracken*, 1 Pinn. 174; 39 Am. Dec. 296; and is not open to collateral attack: *Sykes v. McRory*, 10 Ga. 465; 54 Am. Dec. 402; *Tison v. Yawn*, 15 Ga. 491; 60 Am. Dec. 708.

CONFLICTING ENTRIES OF PUBLIC LANDS. — Where lands are lawfully entered at the United States land-office, the receiver's receipt, showing full payment of purchase-money, is *prima facie* evidence that purchaser complied with the law in making the entry, and he thereby acquires a right to a patent, of which he cannot be divested except as provided by law; and if, because of failure to report sale, or account for money paid for land, or the non-performance of any official duty with reference to such entry, it is subsequently disregarded by the land officers, and same land sold and issued to another person, the latter is invested with no interest in the land, and acquires only the naked legal title: *Chowning v. Stanfield*, 49 Ark. 87.

A PATENT CANNOT BE ATTACKED COLLATERALLY: *Mayor of Aspen v. Aspen Town and Land Co.*, 10 Col. 191.

JUDGMENT WILL NOT BE REVERSED FOR OMISSIONS THEREIN NOT PREJUDICIAL TO THE APPELLANT: *Schmitz v. Schmitz*, 19 Wis. 207; 88 Am. Dec. 681; nor for mere irregularities: *Ward v. Ringo*, 2 Tex. 420; 47 Am. Dec. 654; nor for error not prejudicial: *Johnson v. Jennings*, 10 Gratt. 1; 60 Am. Dec. 323; *Matter of Smith*, 4 Nev. 254; 97 Am. Dec. 531, and note 540; *Schultz v. Sweeney*, 19 Nev. 359; 3 Am. St. Rep. 888.

LITTLE PITTSBURG CONSOLIDATED MINING CO. v. LITTLE CHIEF CONSOLIDATED MINING CO.

[11 COLORADO, 223.]

JUDGMENT IS CONCLUSION OF LAW in a particular case announced by the court; and if, from the record entry of what purports to be the judgment, enough is found to show that the court intended to render judgment, it will not be set aside because it is not couched in artificial and technical phraseology.

JUDGMENT. — CORRECT CONCLUSION WILL NOT BE OVERTHROWN because reached by illogical reasoning, or upon some grounds which are false.

JUDGMENT RENDERED ON FINDINGS OF REFEREE must stand, where sufficient facts are found by him to warrant the judgment, though some of his findings may have been set aside, if there is no error in applying the law to those remaining.

CONFUSION OF GOODS — BURDEN OF PROOF ON WRONG-DOER. — Where, in a case of confusion of goods, the nature of the wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the burden of proof is on defendant. The law aids the remedy against the wrong-doer, and supplies the deficiency of proof caused by his misconduct by making every reasonable intendment against him, and in favor of the injured party. The relative situation of the parties, disclosed by the character and nature of the transaction, makes this rule.

CONFUSION OF GOODS. — Man who willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will be compelled to bear the inconvenience of uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share cannot be distinguished, or of responding in damages for the highest value at which the property can be reasonably estimated.

CONFUSION OF GOODS. — **WRONG-DOER**, by so committing his wrongs upon property held by two or more parties successively in point of time so that neither can show with certainty what he has suffered, is not permitted to defeat a recovery by either, and be thus exempted from liability.

PRINCIPAL IS BOUND TO KNOW WHAT HIS AGENT DOES in the course of his employment, and particularly when the profits of the conduct of the agent go into the pockets of the principal while the agent is acting within the scope of his employment.

PRINCIPAL AND AGENT. — **AGENT'S EMPLOYMENT** is to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction.

PRINCIPAL AND AGENT. — **ACT OF AGENT OF CORPORATION**, necessarily acting through agents, is, within the scope of his delegated authority, the act of the corporation, for which the latter must respond to the other servants and strangers alike.

WHERE AGENT VIOLATES HIS DUTY TO HIS PRINCIPAL, and is guilty of wrong to a stranger, whereby the employer is directly and pecuniarily benefited, the wrong is the wrong of the latter, and he stands in the same legal situation as the agent would occupy were he sued for the injury.

BOUNDARY—TRESPASS. — Every one must know the boundaries of his own land; and in an action *quare clausum fregit* against him for passing his own boundaries and entering the land of another, he cannot defend by showing his ignorance of the boundary lines. Whether he or his servant acting within the scope of his employment committed the trespass is immaterial.

PLEADING AND PRACTICE. — **PARTY SETTING UP AFFIRMATIVE DEFENSE** has the burden of proof to show it true.

PLEADING AND PRACTICE. — **PARTY MAY DENY** wholly the wrong with which he is charged, putting the party alleging it to the proof, relying upon his inability to make such proof of any part of the whole wrong. But the fact that the complaining party does succeed in proving a part only of all the wrongs alleged is no evidence that defendant is surprised in either fact or law.

JUDGMENT ON REFEREE'S REPORT. — Where referee reports findings of law and fact, and the judgment entered thereon sets aside the findings of law, yet if they were not essential to it, and it is fairly supported by the findings of fact, it will not be reversed.

Markham, Patterson, and Thomas, for the appellant.

Clinton Reed and Samuel P. Rose, for the appellee.

MACON, C. The facts, as found by the referee and reported to the court in this case, which are material to this opinion,

are these: That the appellee, some time during the year 1880, entered into and upon the premises of appellant, and extracted therefrom, and converted to appellee's use, ore amounting in value to something over nineteen thousand dollars; and that some time during the latter part of 1879, and the early part of 1880, appellant entered into and upon the mining premises known as the Little Chief mining claim, and extracted therefrom, and converted to its own use, ore of the value of over thirty-seven thousand dollars. The referee also found as a fact that a portion of the trespass committed by appellant upon the premises aforesaid was done while the premises were the property of appellee's immediate grantor, and a part was committed after the acquisition of title to said premises by appellee; but how much was taken from the grantor of appellee, and how much from the latter, was not shown. Upon this state of the case, the referee concluded, as matter of law, that appellee could recover nothing for the ore taken by appellant after the acquisition of title to the premises by the appellee, because of a failure of proof as to the exact extent of its loss. Upon the filing of the report, appellant moved for judgment thereon, and appellee filed exceptions as to the whole report, and moved for such judgment as the facts and the law of the case warranted. The court sustained the exceptions to the report as to the first, fourth, fifth, sixth, and eighth conclusions of law, and entered judgment in favor of appellee in the sum of \$23,589.73. Exceptions were then filed by appellant to the finding of the referee to the effect that appellant had entered in and upon the mining premises known as the Little Chief, and extracted therefrom ore to the value of \$37,125, which being overruled appellant filed its motion for a new trial, which also being overruled appellant appealed to this court.

One of the assignments of error relied on by appellant is, that the court sustained the exceptions of appellee to the report of the referee *in toto*, and retried the case upon the evidence found in the report; thus disregarding the facts found by the referee, and putting itself in the place of the referee, usurping the province of a jury. This view is accepted by the majority of my associates, and upon that ground they hold that the judgment should be reversed. In this opinion I cannot concur. The majority opinion rests upon the construction of the language of the motion of appellee for judgment, and upon that of the court in the order for judgment. The

language of the motion is "to enter such judgment in the cause as the facts proven and the law warrant." The language of the court is: "Now, this day comes the plaintiff herein, by Messrs. Thomas and Lyles, its attorneys, and comes the defendant herein, by Clinton Reed, Esq., its attorney; and the court, having had under advisement the exceptions of said defendant heretofore filed herein to the report of the referee in this cause, as well as its motion to vacate and set the same aside, and to hold the same for naught, and to enter such judgment in this case as the facts proven and the law warrants, and having duly considered the same, and being well advised in the premises, now sustains said exceptions as to the first, fourth, fifth, sixth, and eighth conclusions of law as found by said referee, and also sustains said motion to enter such judgment in this cause as the facts proven and the law warrants." It is supposed that counsel for appellee misunderstood the practice in cases referred, and called upon the court to exercise jurisdiction to disregard the findings of fact by the referee, and to find such facts as in its opinion the referee should have found upon the whole evidence, and thereupon to render such judgment as the law of such facts warranted, and that the court fell into the same error, and usurped jurisdiction to that extent. It may be admitted that the language of the motion justifies this inference as to the counsel for appellee; but I can find no warrant for the opinion that the court mistook the law, and adopted the view of the counsel, and thereby exceeded its jurisdiction in the premises. In the first place, it is a familiar rule that courts of general jurisdiction are never presumed to have transcended their jurisdiction, and he who urges excess in this particular must show it. If the record plainly shows the fact, that is the end of the controversy as to that question; but if the record entry is capable of a construction consistent with the presumption of jurisdiction, that construction will be adopted.

In my opinion, it is impossible to find in the order any support for the position that the court accepted the supposed erroneous views of counsel for appellee, and disregarded the findings of fact by the referee, and proceeded on its own findings. The report of the referee is not set aside and held for naught as a whole; for only the first, fourth, fifth, sixth, and eighth conclusions of law are set aside in terms. It seems impossible to say that that part of the report not expressly set aside was not left untouched by the court. The words, "being well

advised in the premises, now sustains said exceptions as to the first, fourth, fifth, sixth, and eighth conclusions of law as found by said referee," in the connection in which they are found, are to my mind as conclusive that all of the other exceptions, both as to the law and the facts reported, were left undisturbed, as if the words "the other exceptions are overruled" had been added: A judgment is the conclusion of law in a particular case announced by the court; and, while the language used by courts in pronouncing judgments is in many instances identical, yet there is no legally prescribed verbal formula which must be used for that purpose. If, in the record entry of what purports to be the judgment, enough is found upon which it can be seen that the court intended to render judgment, it will not be set aside because it is not couched in artificial and technical phraseology. But I can find in this entry of judgment no fault with the language used by the court. The clause, "and also sustains said motion to enter such judgment in the cause as the facts proven and the law warrants," does not mean any acceptance of the supposed views of counsel as to the jurisdiction of the court to find the facts, but is simply used for the purpose of identifying the motion ruled upon. It is also supposed that the clause found in this entry, to wit, "and it appearing to the court from the facts contained in the referee's report, aforesaid, that said defendant should have judgment against said plaintiff for the sum of \$23,589.73, it is now by the court considered," etc., goes to show the usurpation of jurisdiction by the court below; that, in using the term "facts contained in the referee's report," the court intended such facts as, in its opinion, the testimony given at the hearing before the referee established, and not such facts as found by the referee. There is nothing to show that the court did not use this expression as synonymous with the term "facts found," but a great deal to show that, in the mind of the court, the two forms of expression were one and the same in meaning; for it is undeniable that the court accepted every finding of fact reported by the referee, and upon them founded its judgment,—the fact that each party had mined in the premises of the other, and converted large quantities of ore taken therefrom, the value of such ore so taken and converted, the date of the actual acquisition of the Little Chief premises by the appellee, the fact that a portion of the ore taken by appellant was taken before the acquisition of appellee's title to the premises, and, in

short, all the facts on which the referee rested his conclusions of law. It certainly does not appear, in that clear and unequivocal way in which it should to support the view of the majority, that the court disregarded a single fact found by the referee; and in this state of the case the presumption that the court did not transcend its jurisdiction should be allowed its full force.

If, however, the court did set aside some of the facts found by the referee, if enough were left to authorize the judgment rendered, it should stand, unless there were error in applying the law to such facts. It cannot be denied that, so far as the facts found by the referee, and unquestionably accepted by the court, go, they are sufficient to justify the judgment, unless, as already said, the court erred in the application of the law thereto. It is true that, in the opinion by the court stating the grounds of its judgment, some dissent was expressed with the finding by the referee as a fact that the plaintiff was duly incorporated under the laws of New York, and, by a compliance with the laws of Colorado, authorized to do business in this state; but this dissent was rested upon the ground of such finding, and not upon the finding itself; for the court held the stipulation entered into between the parties before the referee, and reported by him, waived or rather admitted such incorporation, and made it unnecessary to offer evidence to that point. But if it were conceded that the court below did review the entire case, and find facts not found by the referee, upon which, as well as those found by the referee, its judgment was based, and that, without such supplemental facts thus found by the court, it would have given judgment for the appellant, the judgment should not then be reversed, if it appears that the facts reported by the referee were sufficient to have justified the judgment. Such action on the part of the court would be error without prejudice only. It is clear that there were sufficient facts reported by the referee, as found by him, to warrant the judgment, without any additional facts, if the law is as I think it is. Then, did the court err in applying the law to the facts reported by the referee?

In the examination of that question, I shall express no opinion upon the ruling of the court below upon the doctrine of relation, and as to the effect of the stipulation of the parties made before the referee; because, if the court erred in its opinion as to these, and still held correctly as to the duty of appellant to make out the fact that a part of the ore taken by

it from the Little Chief premises did not belong to appellee, and to show how much belonged to its grantor, such errors will not reverse the judgment. A correct conclusion is not overthrown because it is reached by illogical reasoning, or upon some grounds which are false. The ruling of the court on this point is supported by a principle which has very frequently been applied in adjudged cases, and after diligent search I have been unable to find one case in which it has not been applied in the same way as in this, upon facts of the same class and nature as those of this case. In the American note to the leading case of *Armory v. Delamirie*, 1 Smith's Lead. Cas., pt. 1, 679, the doctrine is broadly stated thus: "When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrong-doer, and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the person whom he has injured. A man who willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share cannot be distinguished, or responding in damages for the highest value at which the property in question can reasonably be estimated"; citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Ryder v. Hathaway*, 21 Pick. 298; *Clark v. Miller*, 4 Wend. 628; *Bailey v. Shaw*, 24 N. H. 297; 55 Am. Dec. 241; *Preston v. Leighton*, 6 Md. 88. Here the appellant clandestinely entered into the Little Chief mining claim, under circumstances and in a way which made it practically impossible for the owner thereof to know that fact, and removed therefrom, and converted to his own use, property to the value of \$37,125. It is said that part—a large part—of this property was taken from the grantor of the appellee, and a part from the appellee (which, upon the facts of this case, must be admitted); and that, as appellee affirms such wrongful taking of its property, the burden of proof of that fact is on it to show exactly how much of the ore belonged to the appellee, and that, in the absence of such exact proof, the appellant is relieved from all responsibility. In *Suydam v. Jenkins*, Sedg. Lead. Cas. 566, Duer, J., speaking for the

court, says: "Unless we are greatly mistaken, there are certain indisputable rules, or, more correctly, principles of natural justice, by the application of which the amount that the injured party ought to recover may in all cases be readily and certainly determined. Setting aside the exceptional cases in which exemplary damages may be justly claimed and given, and confining ourselves to those in which the remedy sought is simply pecuniary, the principles which, as it seems to us, are manifestly just and universal in their application, are that the owner to whom compensation is due must be fully indemnified, and that the wrong-doer must not be permitted to derive any benefit or advantage whatever from his wrongful act. . . . An indemnity must always be given to the injured party; but it is not in all cases the measure of damages which the wrong-doer ought to pay." If the doctrine announced in the authorities above referred to is law, then it is clear that this position of appellant has no foundation on which to stand. The practical result of the rule contended for in this case is, that a wrong-doer, by so committing his wrongs upon property held by two or more persons successively in point of time that no one of such persons can show with certainty what he has suffered, is to be permitted to defeat a recovery by either, and to be exempted from all responsibility for his wrongs. Such a doctrine is equally shocking to legal as to moral justice, and I believe no case can be found which supports it.

The case of *Dean v. Thwaite*, 21 Beav. 621, is exactly in point, there being no fact in that case upon which it is possible to distinguish the principle to be applied from this. There the plaintiff brought his suit for an accounting against defendant in the year 1855, alleging an injury upon his colliery by the defendant, and a continuous working therein, and the extraction of coal therefrom since 1840. One defense, among others set up in that case, was that a large part of the coal taken by the defendant was subject to the bar of the statute of limitations; and though the report of the case does not expressly show that defendant insisted that plaintiff must show with certainty how much coal was taken by defendant within the statute of limitations before he could recover for anything, it is obvious from an examination of the case that such defense was made and contested by the plaintiff. But whether this be true or not, the rule adopted by the court is so clear, and so entirely applicable to the facts of this case, that it may well be inserted here. After the first argument of the case, the

master of rolls said: "The question of liability with respect to the working of minerals underground, which cannot be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light; and it is very important to consider upon whom the burden of proof lies in a case of this description. In my opinion, the burden of proof lies upon the wrong-doer to show that the coal has not been taken from the plaintiff's property within the time during which this court would make him accountable for it. It was impossible for the plaintiff to ascertain that fact; it was solely within the knowledge of the defendants and their workmen. I think that the plaintiff has made out his right for an account of the coal which has been taken from his ground, subject to the question of the statute of limitations, upon which I should wish to hear a reply." It appears that argument was heard upon that question, and the master of rolls then used the following language: "I will state my opinion to-morrow. If I should be of opinion that the account should be limited to six years before the filing of the bill, which is my present impression, the course I should probably take is this: I should direct some competent person to ascertain the amount of coal which has been taken from the plaintiff's land, and then require the defendant to show what part has not been taken within the last six years."

On the next day the court delivered the final opinion thus: "I retain the opinion which I expressed yesterday that an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill. . . . There are, besides, some indications on the evidence, which weigh with me on this question, that the plaintiff was put upon inquiry, and that various circumstances existed which might have led him to take proceedings at an earlier period than he actually did, for the purpose of ascertaining the state of the works below the surface of the earth, and whether they trenched on his property. I am of opinion, therefore, that in this case the account must be confined to six years before the filing of the bill. The way I intend to deal with the account is this: I shall see if the parties themselves can agree as to the amount and extent of those workings. If they cannot, then I shall probably appoint, under the powers intrusted to me by the act of Parliament (which I think extends to cases of this description), some coal agent who is perfectly well acquainted with matters of this descrip-

tion to examine and make a report as to the state of the works, and as to what coal has been taken from under certain plats of land of the plaintiff, which will be specified, and to take all proper measurements for that purpose. Suppose he finds that a certain quantity, say one thousand tons, has been taken. I shall then call on the defendant to show what portion of that coal has been taken prior to the six years. I think the burden of proof ought to rest on the defendant, for this reason: I assimilate this to the case, which I have frequently had occasion to refer to, of the chimney-sweep who found the diamond ring (*Armory v. Delamirie, supra*), and governed by the principle, which I have constantly acted upon, that the case will be taken most strongly against a person who keeps back and destroys evidence. I apply that principle to a person whose duty it was to keep strict evidence of what workings there were in other persons' lands, and shall charge a person working the coal mines on the adjoining land with the full amount raised, unless he can prove it was not taken within the time during which the court directs the account. On taking that account I shall certainly not treat this as a case of fraud, but shall act on any reasonable evidence I can get to ascertain at what time the coal was worked. This is the view I take with respect to the mode of taking the account of the coal worked."

This case calls more loudly for the application of the doctrine that the wrong-doer must suffer from the confusion he has created, or the want of evidence which he has made it impossible for his victim to produce, than did the case just quoted; because, in the latter case, there were some facts indicating that plaintiff had notice of the trespass complained of, and might have made such examination as to have discovered the extent of the wrong, and brought his suit earlier; but here there is no pretense even that appellee or its grantor had the remotest suspicion of the trespass of appellant. The fallacy of the opinion of the majority is in confounding the distinction between the burden of proof and the weight of evidence. The former is a rule of law; the latter of fact. The one belongs to the court; the other to the jury. Whether the burden of proof as to a certain fact is on the plaintiff or defendant, the court will determine upon the settled rules of evidence, one of which is, that the burden of maintaining any issue of fact rests upon him who, from the nature and character of the fact, has or might have peculiar information thereon. It is thought that the ruling of the court on this

point rested on the fact that appellant withheld evidence it might have produced; and that, as it was not shown by appellee that appellant had knowledge as to how much ore it took from the grantor of appellee, the ruling was erroneous, and the judgment ought not to stand. This is a mistaken view, arising from a failure to discriminate between the case where one party actually has evidence he will not produce, and that where, from the nature of the fact in question, one party might and ought to know of the circumstances, and the other cannot be supposed to have any definite knowledge thereof. Here the law presumes that the appellee cannot know how much ore appellant had extracted from the Little Chief mining premises before the former acquired the title thereto, because the trespass was committed underground, in the dark, and secretly; while the law does presume that appellant does know that fact, because it might and it is its duty to know it. It is upon the consideration of the relative situation of the parties, disclosed by the character and nature of the transaction, that the rule is adopted; and it is not set aside because the wrong-doer in any particular case may show that he does not in fact know more of the matter than the sufferer. The same doctrine was enforced in *Mortimer v. Cradock*, 12 L. J. Com. P. 166, cited in 1 Addison on Torts, 561, the facts of which were, that a diamond necklace of the value of five hundred pounds had been stolen, and a portion of the stones were soon afterwards found in defendant's possession. A verdict against him for the value of the whole article was sustained. The whole doctrine grows out of the maxim that no man shall take advantage of his own wrong, and is administered in various ways. A familiar example is found in the confusion of goods, and in cases of tort where one tort-feasor is made to bear the burden of the whole loss, though in fact he may have received none of the fruits of the wrong.

My associates seem also to think that the fact that the appellant, the Little Pittsburg Consolidated Mining Company, as a company, did not know of or sanction this wrong committed by its superintendent, has such force and bearing in the case as to relieve it from the necessity imposed upon it by the court. Such fact was not found by the referee, and does not appear in the record; but if it did, it would not affect the question. A principal is bound to know what his agent does in the course of his employment, and particularly so when the profits of the conduct of such agent go in the pockets of

the principal. In *Dean v. Thwaite*, *supra*, the defendant denied, under oath, her knowledge that she was trespassing upon the property of the plaintiff, and the court accepted her statement as true, and said: "I shall certainly not treat this as a case of fraud"; and yet enforced the rule against the defendant.

It is thought the willfulness of the wrong committed by Bearce, appellant's superintendent, and the ignorance of the appellant of the fact until after its consummation, relieves it from the rule of evidence insisted on above; and the doctrine upon which this view is based is, that where the act of the agent is one done by him outside of the scope of his employment, for his own gratification or profit, the principal cannot be held liable for the consequences of such act. As a general proposition, this may be conceded. In support of this position many cases are cited; but, as I view the law, they are inapplicable to the question under discussion. They establish the exemption of the principal from all liability to the injured party where the agent is found to have acted outside of his authority, express or implied. But here it is conceded that appellant is liable to appellee for so much of the ore as the latter may be able to show itself entitled to. The cases cited in the majority opinion hold that the principal is liable upon the ground that the servant did the wrong complained of within the scope of his employment; or that the master is not liable because the servant acted beyond the scope of his employment. All the cases and text-books cited on this subject go upon the ground that the act which is the cause of action results in no pecuniary profit to the principal; but no case can be found which holds that where the agent, upon his own motion, illegally takes the property of one, and gives it to his principal, the principal is not liable for such property, or its value. If, then, the appellant is liable to appellee for the act of its superintendent in the premises, does the mere fact of its receiving and converting the ore, or its value, in ignorance of the true ownership thereof, change the rule of evidence on the facts of this case? I think not, for the following reasons:—

1. The fact is found by the referee that appellant took and converted this ore; and that finding this court is bound to accept, because appellant accepted such finding in moving for judgment on the report, and because the evidence before the referee supports the finding.

2. The superintendent, Bearce, in mining and milling the ore, acted for the appellant, and within the scope of his employment. He did not act for himself, nor for a stranger, and it is impossible that one should act for no one. Nor does it appear that he committed the wrong from any spirit of actual malice or hostility towards appellee or its grantor, but solely in the interest of appellant. In all that was done by him he used the means, machinery, appliances, and workmen of appellant. Everything was done in its name. His salary, if he was paid for his services, was paid by the appellant, and the entire profits of his operations went into the coffers of his employer. The scope of an agent's employment is said, in *Kingsley v. Pitts*, 51 Vt. 416, "to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction."

3. Bearce was appellant's mining superintendent, and was clothed with the general management and control of its mining operations, with power to direct when and how the workmen in the mine should work; or he was, in this department, subject to the orders and directions of appellant. If he occupied the first position, then, as to those under his control and as to strangers, he was the principal, and his acts were its acts, and his wrongs its wrongs. He was the representative of the company, as much so as would have been the president and all the other directors of the company had they exercised the same powers as the superintendent. In *Malone v. Hathaway*, 64 N. Y. 5, in discussing the doctrine of responsibility of employers, whether corporations or natural persons, for the acts and omissions of their superintendents, Allen, J., says: "Corporations necessarily acting by and through agents, thus having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the services of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within the limit of the delegated authority of the acting principal. These acts are, in such cases, the acts of the corporation; and the corporation, within adjudged cases, must respond as well to the other servants of the company as to strangers. They are treated as

the general agents of the corporation in the several departments committed to their care. A person thus placed by a corporation in such a position and authority may be fairly considered as its representative *pro hac vice*." In *Corcoran v. Holbrook*, 59 N. Y. 517, the rule is thus expressed: "It is evident that this general agent was not a mere fellow-servant of the plaintiff. He was not a common hand in the mill, but that he was charged with the performance of the duties which the defendants owed to the hands employed in the mill. There was no other person to discharge those duties, and defendants could not, by absenting themselves from the mill and refraining from giving any personal attention to its conduct, but committing the entire charge of it to an agent, exonerate themselves from those duties or from the consequences of a failure to perform them. . . . As to acts which a master or principal is bound, as such, to perform towards his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed." These cases were brought by servants to recover of their employers for injuries caused by the negligence of superintendents; and the question decided was that of the right of such employees to recover for the negligence of the vice-principal; but the legal consequences of such authority in the agent are as applicable to cases where strangers are injured by such agent as in those of servants. The liability of the principal arises out of the representative character of the servant whose act or omission has caused damage. Occupying such a position, and vested with such authority, he is bound to do or prevent the doing of all acts which will protect in the one case, or injure in the other, both the employees of his principal and strangers. If he violates his duty to his principal, and is guilty of a wrong to a stranger, whereby the employer is directly and pecuniarily benefited, such wrong is, in point of law, the wrong of the latter, and he stands in the same legal situation as the agent would occupy were he sued for the injury. It cannot be denied that it was the duty of appellant, in mining its own territory, to respect that of its neighbors, and restrain its workmen and servants from trespassing upon such neighbors. Having delegated the entire control of its mine and miners to a superintendent, withdrawing from all control and supervision itself, it cannot be heard to say that it was not present when the wrongs complained of

were committed, and knew not of their commission. But if Bearce was not vested with this general authority, and was under the control and direction of appellant, through its board of directors or other agent, then the company is certainly bound to know what its servants were doing, and to control them.

4. Because appellant cannot be heard to say it did not know that its superintendent was trespassing upon the premises of another. To repeat: if Bearce had such authority in the premises as to make him appellant's superintendent, then, by the rule of law which holds him to be the principal as to third persons, the question of notice is excluded from the case; but if he was less than a representative, and was directed and controlled by his principal, the latter is estopped to say it did not know that which its agent knew. The law is thoroughly settled that, as between the principal and a stranger, the former does know whatever his agent knows, learned while acting for such principal in the particular transaction. Many cases, among which are *Hart v. Bank*, 33 Vt. 252, *Dresser v. Norwood*, 17 Com. B., N. S., 466, and *The Distilled Spirits*, 11 Wall. 356, hold that notice possessed by an agent, even though it may have been acquired prior to his agency, or in another transaction, which he is at liberty to communicate to his principal, will bind the latter. But many of the courts of this country decline to carry the doctrine to this extent, and limit its application to cases where the knowledge or notice possessed by the agent was acquired during his particular agency, and in the course of the same transaction. In *Sooy v. State*, 41 N. J. L. 400, the court, in its discussion of the doctrine of the cases just cited, says: "The more just principle would seem to be one that aimed to award to each the benefits and burdens which would have arisen if the business had been transacted by both in person. Such a result would follow if the rule to be adopted were that whenever the principal, if acting in the matter for himself, would have received the notice the knowledge of his agent shall be chargeable to him." If we apply this rule to the facts of this case, it is at once manifest that, had the appellant done its own work in the mine, dispensing with agents and superintendents, it must have known when it crossed its boundary line and entered the Little Chief territory. Here, also, the knowledge of the superintendent, with which the appellant is chargeable, was obtained in and by the very transaction constituting the cause of action.

5. Because, if the appellant, by its whole body of directors, had worked in its mine and ignorantly crossed into the Little Chief ground, and taken and appropriated the proceeds of this ore, it would be liable therefor to the owner thereof, and would be bound to show how much of it did not belong to appellee. The entry in such case would be wrongful, though done unwittingly; and appellant, being a wrong-doer, would be subject to the rule cited above, that what is one's duty to know the law holds him to know. Neither in legal nor natural reason can there be any difference between taking the ore ignorantly and taking the value thereof without knowledge of the place from which the ore was taken; and if, in the first instance, the burden of proof would be upon appellant, it would in the last. Over the superintendent of appellant appellee had no control; with him it had no connection; between them there was no privity and no channel of communication; while he was the mere creature of appellant. It was his legal and moral duty to keep out of the premises of appellee. If he would not, but, for the direct and sole benefit of his employer, he would take the property of appellee, his duty to know how much he took is undeniable, and it is but simple justice and reason that his employer should exact of him the observance of this duty, and failing so to do, be held to the same obligation. Appellant is as much bound to know where the money it received came from as it would have been to know from whose ground the ore producing the money came from, had it done the mining. For this position I rely upon the case of *Dean v. Thwaite*, *supra*. It is thought by my associates that the judgment of the master of rolls in that case proceeded on the notion of withholding evidence; but this is clearly a mistaken view. There, the defendant, a woman, positively denied in her answer, under oath, any knowledge that her workmen and agents had entered the land of the plaintiff, and there was no proof to overthrow this denial. Her denial was accepted as true by the court, and the master of rolls said: "I shall certainly not treat this as a case of fraud. Still, her morally honest ignorance of the fact that her servants had been taking the coal of Dean for her benefit did not relieve her from the duty of showing just how much of the whole mass was taken during the time covered, and excluded from the account by the statute of limitations." If this ruling is good law, why should it not be applied to this case? It is true that the master of rolls said that he assimilated the cases to that of *Armory v.*

Delamirie, Strange, 504, which was a case in which the defendant kept back evidence; but the analogy between the two cases arose, not out of the fact that Mrs. Thwaite actually had, as the jeweler had, the evidence which she could produce, but had out of the legal duty resting upon her to know the boundaries of her own land, and to know when she crossed them; from which followed the legal duty flowing from such legally imputed knowledge, to keep "strict evidence of what workings there were in other persons' lands." Certainly, our law requires every one to know the boundaries of his own land; and in an action *quare clausum fregit* against him for passing his boundaries and entering the land of his neighbor, he could not defend by showing his ignorance of such boundary lines. And whether he, or his servant acting within his employment, committed the trespass is immaterial. Hence in this case, Bearce, being the principal, was bound to know, and in fact did know, when he left appellant's premises, and he, as much as appellant, was bound to keep the evidence of his trespass for the benefit of the suffering neighbor.

6. The burden of proof is upon appellant, upon the plain and well-understood rules of evidence, outside of the question of wrong-doing. It is said that the burden of proof of any fact is upon him who affirms it. This is true in a general sense. It was certainly incumbent on appellee to show, to make good its claim against appellant, that the latter had unlawfully entered upon its mining premises and removed therefrom ore. This it did. It showed that from January 2, 1880, it had been in possession of the Little Chief mining claim, under claim of ownership in fee, and that from January 10, 1880, it had the absolute fee-simple title to the property; further, that appellant had excavated in the said claim a certain area, and taken therefrom ore of the net value of \$37,125, and rested. To meet and avoid the force of this proof, appellant did what in pleading would be denominated "confessing and avoiding"; that is, it showed that, notwithstanding it took all of this ore, appellee was not the owner of all of it, but that a "large part" was the property of appellee's grantor. This was clearly an affirmative defense, which appellant was bound to make good by showing, not only that some of the ore did not belong to appellee, but how much. To illustrate: Suppose appellant, instead of denying in his replication the taking of any ore from appellee, had admitted it, setting up that a large part thereof was taken from the appellee's grantor, and that for such part

it had procured from grantor a release of damages, would appellant not have been called on to show accurately how much of the ore this release covered? In other words, would not such release have been an affirmative defense? and if so, is it any more so than the defense upon which appellant now relies?

The opinion that a new trial should be granted because the amount of ore taken from the grantor of appellee by appellant was not made an issue in the case by the pleadings, it seems to me, is quite novel, and inconsistent with the settled rules of practice. It is said that appellant, by its replication, denied the taking of any ore from the Little Chief premises, and produced considerable evidence to sustain this denial; and that as the fact that appellant had mined in the Little Chief ground, and converted ore therefrom, as well as that a part of the trespass was against appellee's grantor, was developed by the evidence before the referee, and as neither party has had an opportunity to get evidence upon this fact, both should be admitted to reopen the case so far as to produce what evidence they may upon the point. I fail to see what bearing the character or form of appellant's pleading has upon the question. By appellee's answer appellant was charged with entering upon and removing from the Little Chief mining claim a large quantity of valuable ore. Instead of confessing such trespass in part, and avoiding it so far as the ore belonging at the time of its commission to appellee's grantor went, appellant saw fit to deny *in toto* such entry and conversion, and sought to make this denial good, first, by showing it had not entered the Little Chief premises at all, and then, when that position became untenable, by showing that such entry was made before appellee owned the mine. The form of the pleading adopted by appellant certainly did not in the least affect or limit it in making its defense before the referee; for it made by its evidence the very same case as it would have made had it pleaded in confession and avoidance, as above suggested. Upon the form of the issue as to this fact, chosen by appellant, there can be no right to a new trial of that fact. If, however, it is supposed that the pleading shows that appellant had no notice of the wrongs charged in and by the answer in the case until the trial, when it was testified to by witnesses, and that it was taken by surprise, it is answered that such assumption has no basis in the theory of pleading, nor in the experience of practice.

It is good pleading to deny wholly the wrong with which one is charged, putting the party alleging it to the proof, relying upon his inability to make any proof, or proof of the whole wrong; and it is the almost invariable practice to do so. But the fact that the complaining party does succeed in proving a part only or all the wrongs alleged is no evidence that the defendant is surprised in either fact or law. The answer in this case was sufficiently distinct as to dates and amounts, and in every other particular, to fully apprise appellant of the charge against it, and to enable it to prepare its defense. Nor, if we look away from the pleadings to the course of the trial before the referee, do we find any support for the notion that appellant was surprised, or was in any way unprepared to meet the trespass charged against it. The case was commenced in September, 1880, the answer was filed on the first day of March, 1881, and the report of the referee filed in July, 1883. Thus more than two years passed after appellant was by the answer plainly notified that it was charged with this wrong, before the report was filed. All of this time appellant had to inquire whether its agents or workmen had passed the boundaries of its premises, and entered those of appellee or its grantor; and from the array of witnesses it marshaled at the trial, and examined on this fact, it is evident that it was diligent. To say it could not discover at once by a mere inspection of its mine on the side adjoining the Little Chief claim the fact that it had entered and mined in the latter premises is to ignore the evidence of the witnesses before the referee; and to assume it did not at once institute such inquiry is to charge it with a degree of negligence that would deprive it of any right to a new trial. Besides, the witnesses examined by appellant upon this branch of the case were the men who did the very work of which appellee complains, or at least many of them were; and why it should be supposed that others can be found who will speak more definitely on this point, it is difficult to understand. Further, the appellant never asked, during the progress of the examination before the referee, for a continuance on account of absent witnesses, nor for a new trial on the ground of surprise or newly discovered evidence. In the elaborate argument of appellant's counsel, there is no hint or suggestion that a new trial for the purpose of making a better showing as to the ore taken from appellee's grantor was desired, or would be of any benefit to either party. But appellant is content to leave the fact in its present state of

uncertainty, if this court will hold the law to be that appellee must show definitely how much of this wrong was perpetrated upon it, in order to a recovery of anything. Now that appellee's principal witness is dead, it would be unjust to send this case back for a retrial; because, though his testimony may be used in such trial, it will not have the same effect as his oral testimony would have. In my opinion, the judgment in this case should be affirmed.

PER CURIAM. The referee's report was divided into separate findings of fact and of law. The findings of fact were numbered from 1 to 6, inclusive. By reference to the original transcript, we discover that immediately following these findings the referee uses this language: "As conclusions of law I find." Then he adds eight or ten distinct conclusions of law, but leaves them unnumbered. In view of these circumstances, we agree with Commissioner Macon that the court intended to set aside the conclusions of law only, leaving undisturbed the referee's findings of fact. The action of the district court in designating the legal conclusions of the referee by number does not avoid this inference. The language used in the judgment, as well as the circumstance that there is no eighth finding of fact, satisfies us that the learned commissioner's view is correct. We may admit that one or more of the conclusions of law set aside by the court were technically right. Yet, if they were not essential to the judgment, and if the judgment is fairly supported by the facts found, under established legal principles, no reversible error was committed. With this explanation, we adopt the conclusion reached by Commissioner Macon in the foregoing opinion; and the judgment of the district court is accordingly affirmed.

JUDGMENT DEFINED: *Whitwell v. Emory*, 3 Mich. 84; 59 Am. Dec. 220.

ASSIGNING WRONG REASON FOR PROPER JUDGMENT does not invalidate it: *Summerlin v. Hesterby*, 20 Ga. 689; 65 Am. Dec. 639; and see also *Houston v. Williams*, 13 Cal. 24; 73 Am. Dec. 565. And the judgment cannot be impeached as between the parties, because it is not a logical sequence of the opinion: *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736; 68 Am. Dec. 778.

JUDGMENT BASED ON FINDINGS OF REFEREE, CONCLUSIVENESS OF: *Valentine v. Connor*, 40 N. Y. 248; 100 Am. Dec. 476; *Westerle v. De Witt*, 36 N. Y. 341; 93 Am. Dec. 517, note 520; *Fillmore v. Wells*, 10 Col. 228; 3 Am. St. Rep. 567.

CONFUSION OF GOODS: *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233, note 237.

ACT OF AGENT WITHIN SCOPE OF HIS EMPLOYMENT binds principal: *Laro v. Stokes*, 23 N. J. L. 249; 90 Am. Dec. 655; *Westfield Bank v. Cornen*, 37 N. Y. 320; 93 Am. Dec. 573; *Kline v. C. P. R. R. Co.*, 37 Cal. 400; 99 Am. Dec. 282, and notes to these cases.

KNOWLEDGE OF AGENT within scope of his employment is the knowledge of his principal: *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543. Same rule applies to corporations: *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506, and notes to these cases.

PRINCIPAL IS LIABLE FOR TORTS OF HIS AGENT, within the scope of his employment, though they were not known or approved by the principal: *Moir v. Hopkins*, 16 Ill. 313; 63 Am. Dec. 312; *Gerhardt v. Boatman's Savings Institution*, 38 Mo. 60; 90 Am. Dec. 404; *New Orleans etc. R. R. Co. v. Albritton*, 38 Miss. 242; 75 Am. Dec. 98, and notes to these cases.

PRINCIPAL IS LIABLE FOR THE APPEARANCE OF AGENT'S POWERS, and if agent act within his apparent authority, the principal is bound; *Commonwealth v. Hawkins*, 83 Ky. 246; *Bickford v. Menier*, 107 N. Y. 490. The same rule applies to corporations: *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339; 61 Am. Dec. 101, note, and cases *supra*; *Atlantic etc. R'y Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382.

CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS done within the scope of the latter employment: *Henderson v. San Antonio etc. R. R. Co.*, 17 Tex. 560; 67 Am. Dec. 675; *Brokaw v. N. J. R. R. etc. Co.*, 32 N. J. L. 328; 90 Am. Dec. 659; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 671; *Racine etc. R. R. Co. v. Farmer's etc. Co.*, 49 Ill. 331; 95 Am. Dec. 595.

AFFIRMATIVE ISSUES MUST BE PROVED by a preponderance of evidence: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621, note 627.

CORPORATIONS OF WHATEVER CHARACTER ARE PLACED UPON THE SAME FOOTING AS NATURAL PERSONS IN REGARD TO THEIR CONTRACTS, and the implications upon which they are based: *Cicotte v. Church of St. Anne*, 60 Mich. 552; and corporations are liable for acts of its servants, engaged in its business, in the same manner and to the same extent that individuals are liable under the same circumstances: *Hussey v. Norfolk etc. R. R. Co.*, 98 N. C. 34; 2 Am. St. Rep. 312; but corporations are not liable for the malicious acts of their servants, unless such acts are ratified: *G., C., & S. F. R'y Co. v. Moore*, 69 Tex. 157.

OMAR v. SOPER.

[11 COLORADO, 380.]

MINES AND MINING. — NOTICE OF DISCOVERY put up by the discoverer of a mineral lode at his point of discovery, specifying in addition to the statutory requirements the extent of territory claimed along the vein on both sides of the point of discovery, is an appropriation of so much territory for the period of sixty days in which to sink a discovery shaft, although the boundaries thereof are not marked, and such notice renders void an overlapping claim on the same vein and territory made within the period mentioned, and based upon a junior discovery.

MINES AND MINING. — TITLE TO MINERAL LODGE in the actual possession of parties claiming to own it, and engaged in developing it, cannot be initiated by others by a survey, and recording a location certificate.

MINES AND MINING. — **SURVEYING, STAKING, AND RECORDING** a mineral location certificate of a lode claim previously located, which overlaps the territory of what is claimed to be an abandoned lode claim, is not a relocation of the latter claim within the meaning of Colorado General Statutes, page 725, section 2411.

MINES AND MINING. — **WHERE LODGE CONSISTS** of a single vein, the portion thereof appropriated by the first discoverer is wholly withdrawn from interference or claim by another until some default is made, and the law relating to cross-lobes approaching from different directions and uniting at some point, and authorizing the subsequent locator to cross or enter the territory of the claimant of the other lode, has no relation to single veins.

MINES AND MINING. — **WHERE ONE OF TWO DISCOVERERS** of a mineral lode acquired the interest of the other therein, and then erased the name of the latter from the notice of discovery, changed the date thereof from time of discovery to time of acquiring the whole interest, and continued in possession developing the lode, and claiming in good faith to be the owner, no abandonment took place, nor did he lose or forfeit any rights acquired by the previous discovery.

MINES AND MINING. — **FAILURE TO RECORD MINERAL LOCATION CERTIFICATE**, within three months from the date of discovery of the lode, will not inure to the benefit of the owners of an overlapping claim based on a junior discovery, when such owners have neither made nor attempted to make a relocation.

MINES AND MINING. — **WHERE CLAIM SET UP TO TITLE** to mineral lode is void in its inception, plaintiff has no standing to question the validity of defendant's title.

MINES AND MINING. — **MINING TITLES** cannot be questioned collaterally.

ACTION involving title to two mining claims, one known as the Golden Bell, the other as the Verde. The Golden Bell was discovered February 24, 1883, by Omar and Clark, who at once posted a notice of discovery stating the number of feet of territory claimed by them. Within the next sixty days they did considerable work, and sunk a discovery shaft to the depth required by law. On the 25th of April next, Omar and Clark, who also owned another property known as the Mammoth claim, exchanged property, Omar taking Clark's interest in the Golden Bell. He then erased the latter's name from the discovery notice, and left his own thereon, and changed the date of discovery to April 25, 1883. The irregular manner in which this exchange was made, it being merely a verbal trade between the parties, is relied upon by the claimants of the Verde as an abandonment of the Golden Bell, and as validating their claim. Omar worked without cessation on the Golden Bell from the time of his discovery to April 25, 1883, the time of the exchange, and on the following May 21st had it surveyed and staked. On the next day he made and signed a location certificate, giving the date of discovery as

April 25, 1883, and on the following May 29th had it recorded. The Verde claim was discovered and notice posted April 4, 1883, by the grantors of the appellee. The notice claimed a certain amount of territory along and on each side of said claim, overlapping the Golden Bell nearly fourteen hundred feet. The Verde claim was surveyed and staked June 7, 1883, and the first location certificate recorded the next day. On June 12, 1883, suit was brought against the claimant of the Golden Bell, in which it was alleged that the claimants of the Verde were seised thereof April 4, 1883; that the claimant of the Golden Bell, by entering his claim, had ousted the former of his title, etc. The claimant of the Golden Bell answered with a general denial, and asserted title. Other facts appear in the opinion.

Dolloff and Rittenhouse, for the appellants.

Alpheus Wright and L. C. Rockwell, for the appellees.

BECK, C. J. The first and second paragraphs of the petition filed for rehearing state the substantial grounds relied upon by the appellees in the arguments upon the rehearing. They are as follows: "1. The decision seems to be based upon the ground that appellees' discovery shaft was sunk upon appellants' claim, a valid subsisting claim, and therefore void. The court erred, in that the discovery of the Verde was made on unoccupied public domain, but it became, by reason of the survey, an overlapping claim on the Golden Bell. 2. The court erred in deciding that the abandonment of the so-called Golden Bell by Omar and Clark, by making its date of discovery the twenty-fifth day of April, 1883, instead of February 24, 1883, did not inure to the benefit of the appellees." It is further urged in this petition that the decision of this court in *Lebanon etc. Mining Co. v. Mining Co.*, 6 Col. 380, holding "that entering upon premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amount only to trespass, and cannot form the basis for the acquisition of title," is not applicable to the facts in this case, because the entry of appellees for the purpose of discovery of the Verde lode was not made on the Golden Bell territory, nor on any ground in appellants' possession.

Upon allowing the rehearing, a question, based, as was supposed, largely upon appellees' theory of the case, was submitted for argument. Counsel for the appellees, however, raised

the objection that the question submitted was unfair to them, in that it assumed a state of facts which did not exist. They did not confine themselves to the discussion of this question, but, as they admit, devoted their principal arguments to the case as presented by the whole record. They also alleged errors and inconsistencies in the opinion filed, which were not pointed out in the petition for rehearing. But in view of the facts that the case must be remanded for another trial, and that important facts and points were misapprehended by the court on the former hearing, we deem it expedient that the opinion filed be withdrawn.

The principal errors assigned upon the record of the trial below relate to instructions given the jury in behalf of the appellees, and the refusal to give instructions prayed by the appellants. The main issue involved in the case is, whether the discoverers of the Verde (their discovery being upon the extension of the Golden Bell lode, but immediately outside that part of the Golden Bell vein and territory then claimed by its discoverers) could, in the manner here attempted, initiate a claim to the territory of the latter lode which might ripen into a valid claim in their favor through subsequent delinquencies on the part of the original discoverers of that lode.

The proposition of appellants that the claim of Omar and Clark to fifteen hundred feet of the Golden Bell lode and territory, on the fourth day of April, 1883, the day of the discovery of the Verde, was then a valid subsisting claim, is supported by high authority. This proposition is disputed by counsel for the appellees. They take the position that the discoverer of a lode cannot keep other prospectors off his lode during the time allowed him by statute for sinking his discovery shaft, by inserting in his discovery notice, in addition to matters required by statute, the number of feet claimed upon the vein on each side of the point of discovery; also, that such a notice does not render void an overlapping claim on the same vein and territory, made within the period mentioned, upon a junior discovery. Upon these points, the views of appellees' counsel are in conflict with the views of the supreme court of the United States.

In the case of *Erhardt v. Boaro*, 3 McCrary, 19, tried in the circuit court of the United States for the district of Colorado, by Hallett, J., and afterwards removed by writ of error to the supreme court of the United States, Judge Hallett held plaintiff's discovery notice defective because it did not state the

length claimed upon the lode, nor the length claimed in either direction from the point of discovery. It was upon this state of facts he held the discoverer entitled to claim only the *possessio pedis* while sinking his discovery shaft, and that any other citizen might make a valid location, in the mean time, upon any other portion of the vein. But the effect of the decision is, that if the notice had specified the extent of the claim, the discoverer's right, to the full extent, would have been protected. Mr. Justice Field, upon reviewing the case in the supreme court, says: "The written notice posted on the stake at the point of discovery . . . declares that they claimed one thousand five hundred feet on the 'lode, vein, or deposit.'" How such fact appears from the record in that case is not for us to inquire. The court held that, although the notice was indefinite in not stating the number of feet claimed on each side of the discovery, yet it would protect 750 feet on either side of the point of discovery from the trespasses or claims of others, for the period of sixty days, the time allowed by the statute of Colorado for the sinking of a discovery shaft: *Erhardt v. Boaro*, 113 U. S. 527. Counsel in the present case raise the point that the statute does not require the discovery notice to contain such a specification. As we have seen, both Judge Hallett of the district court of the United States for the district of Colorado, and the supreme court of the United States, hold such to be the effect of our statute, if the extent of the claim is specified in the notice. While none of the cases heretofore brought before this court may have presented this identical point, our views of the proper construction of the state statute are in full accord with the foregoing decisions concerning the effect of a legal notice posted at the point of discovery of a lode, which specifies the extent of territory claimed thereon on either side of the point of discovery.

It is conceded that if the boundaries of the Golden Bell had been marked, no claim to any portion thereof could have been initiated until after a forfeiture had occurred. To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim thereon in order to protect it from the invasion and claims of other persons learning of his find, would be an unreasonable, if not an impossible, requirement. An attempt to do so would result, in many cases, in leaving the main portion of the lode outside the staked boundaries. The object of the statute, in giving

sixty days for sinking the discovery shaft, was evidently to afford the miner time to sink his shaft, and to ascertain the true course of his lode, when he would be qualified to mark its boundaries on the surface. When the legislative intent is clear or can be reasonably inferred, it is held to be the duty of the courts to so construe the statute as to render it effective, if possible to do so under the rules of statutory construction: *Simmons v. Powder Works*, 7 Col. 285-289. To hold that the claim is protected throughout its whole extent during this period from invasion and adverse claims, by a notice which, in addition to the statutory requirements, shall specify the extent of territory claimed along the vein on both sides of the point of discovery, is both reasonable and equitable. It is likewise consistent with the spirit and policy of the statute, and a construction which renders it effective. Such a notice, properly made and posted, is an appropriation of the territory specified therein for the period of sixty days.

It has been repeatedly held that only the unappropriated mineral lands of the United States are open to exploration and location. No one can, therefore, lawfully enter upon the territory so claimed, during the period named, for the purpose of initiating a claim thereto; and it necessarily and logically follows, from an application of the same rules and principles, that no one, during this period, can stand outside such appropriated territory, and, in any manner, initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances.

The intimation that the claim of Omar and Clark to the Golden Bell was not made in good faith is, in our judgment, without foundation, and is evidently based on a misconstruction of Omar's testimony. He swears that he worked almost continuously upon the lode from February 24th up to the commencement of this suit, and in this he is strongly corroborated by other witnesses, as well as by the amount of work which he performed upon the ground in controversy during this time.

But another position assumed in argument is, that the Verde party made no claim to the territory in dispute until after Omar and Clark had abandoned their claim thereto, and until after the forfeiture became complete by the failure of the appellants to record their certificate of location of the Golden Bell within three months after the date of the discovery, February 24, 1883; that the owners of the Verde then appro-

priated the forfeited territory by extending their survey over the same. This extension of survey, so called, took in about fourteen hundred feet of the appellants' lode, including their discovery shaft and all the workings, and was made while the appellees were in actual possession. We observe, in the first place, that the record shows the claim of the appellees did not originate in this survey; and, in the second, that if it did, it was invalid, for the reason that, under the mining laws and decisions, title to a lode in the actual possession of citizens who claim to own it, and who are engaged in developing it, cannot be initiated by other persons by a survey and the recording of a location certificate. The origin of appellees' claim dates from April 4, 1883, when their grantors uncovered the lode at a point immediately southerly and outside of the territory claimed by the discoverers of the Golden Bell. The notice then posted by the Verde discoverers claimed fourteen hundred feet "northerly" (which overlapped and included all but one hundred feet of the Golden Bell), and one hundred feet "southerly."

The Verde party denominate their survey, made June 7, 1883, a relocation of the Golden Bell, claiming that it was open to relocation at that time, by abandonment and forfeiture. If the lode was open to relocation at the date of this survey, no relocation was made or attempted in manner required by law. All that was attempted to be done was to perfect the location of the claim, previously made by the discoverers of the Verde, to the territory of the Golden Bell, by surveying, staking, and recording a location certificate of that identical territory, all of which, as we have shown, was without warrant of law. These acts not only fall far short of the requirements of the statute concerning the relocation of abandoned lode claims (Gen. Stats., p. 725, sec. 2411), but do not even constitute an effort to comply with the statute.

The attempt to justify the steps taken by the Verde claimants for the acquisition of title to the Golden Bell, by reference to the statutes relating to location of cross-lodes, is equally abortive. It is illogical, there being no analogy between the two classes of locations, nor in the statute relating thereto. In the present case there is a single vein; and under a fair construction of the statutes, federal and state, the portion thereof appropriated by the first discoverer is wholly withdrawn from interference or claim by any other citizen until some default is made. Such is not the law with regard to

the location of cross-lodes. In such case there are two lodes, which either cross each other or approaching from different directions unite at some point. In such cases the act of Congress (R. S. 2336) authorizes the subsequent locator to cross or enter upon the territory of the claimant of the other lode. In this class of cases, a claim to a portion of the previously appropriated territory may be initiated by authority of law, while it remains a valid subsisting claim; but no such authority exists as to the former class.

Concerning the alleged abandonment of the Golden Bell by Omar and Clark on April 25th, a reconsideration of the point shows the claim was not abandoned by the proceedings which took place on that occasion. The purpose in view was merely an exchange of property, by which Omar should take Clark's interest in the Golden Bell, and Clark should take Omar's interest in the Mammoth lode. However irregular this transaction may have been, Clark's possession of the Golden Bell being surrendered to Omar, the intention of the parties was effectuated. It has been held that a written conveyance is not necessary to the transfer of a mining claim: *Mining Co. v. Taylor*, 100 U. S. 37; *Tunnel Co. v. Stranahan*, 20 Cal. 198. Omar, by erasing Clark's name from the discovery notice, and remaining in actual possession, assumed full ownership of the claim. It is a settled principle of law that an abandonment of property is a question of intention. A transaction affecting property may be irregular; but if the owner does not intend to abandon it, and continues in possession, claiming in good faith to be the owner, no abandonment can take place: *Mallett v. Mining Co.*, 1 Nev. 188; *Myers v. Spooner*, 55 Cal. 257. The testimony as to Omar's intention in the matter is conclusive that he did not intend to abandon this lode. He continued the work of development as before, and about two weeks afterwards struck rich mineral. We are also of the opinion that he did not forfeit any rights previously acquired by himself and Clark in the Golden Bell by the changes made in the discovery notice at the time of the transaction referred to. If this claim subsequently became liable to relocation by reason of the failure of Omar and his co-owners to record their location certificate within the period of three months from February 24, 1883, the date of discovery, such default did not inure to the benefit of the appellees, since, as we have seen, they neither made nor attempted to make a relocation.

The result of this review of the case upon the whole record

is substantially to narrow the issues to the single question whether a claim of ownership to mining territory which has been appropriated by the discoverers of a lode therein, made in the manner and under the circumstances above stated, can be initiated by other persons before default or forfeiture on the part of the discoverers, so as to make it capable of ripening into a valid title, and to answer the same in the negative. It appearing, then, from the record before us that the claims of title set up by the plaintiffs below to the territory of the Golden Bell were void in their inception, both the claim thereto asserted upon the discovery of the Verde and that alleged by way of relocation or extension of survey, the determination of this point is an end of the controversy as between the parties to this record. The plaintiffs, not, being invested with any title, have no standing in court to question the validity of defendant's title. Mining titles cannot be questioned collaterally: *McGinnis v. Egbert*, 8 Col. 46.

It follows from the points decided that the instructions given to the jury on behalf of the appellees were misleading and erroneous in important particulars. The first assumes that adverse rights to mining property may accrue or intervene before forfeiture; the fifth, that all the rights of the discoverers of the Golden Bell, acquired by discovery and posting of notice on February 24, 1883, were lost by changing the names of the claimants and the date of the discovery notice; the sixth, that the appellants are estopped, by their certificate of location, from claiming a discovery of their lode on the twenty-fourth day of February. All these instructions are erroneous and misleading, as between the parties to this controversy, for the reasons above given. The points decided will enable the trial court to correctly instruct the jury concerning the legal propositions involved in the action.

Ordered that the judgment entered herein on the fourth day of January, A. D. 1888, be vacated and set aside, that the opinion filed be withdrawn, and that the judgment of the court below be reversed and the cause remanded.

FAILURE TO RECORD MINING CLAIM does not avoid it, in the absence of mining rules to that effect, as against a subsequent entry and location, when actual possession is taken and kept by the first claimant: *English v. Johnson*, 17 Cal. 107; 76 Am. Dec. 574. And as to rights arising under possession, see the note 579, and also that to *McClintock v. Bryden*, 63 Id. 105.

COLORADO ELECTRIC COMPANY v. LUBBERS.

[11 COLORADO, 505.]

MASTER AND SERVANT—WORK OUTSIDE OF EMPLOYMENT—NEGLIGENCE FOR JURY TO DETERMINE.—Where in an action for damages it appears that the plaintiff was sent by his master, an electric light company, to remove one of its electric lights and connect the wires with the circuit; that the work assigned was outside of his employment; that he was ignorant and inexperienced in such work, and was not instructed how to do it; that the usual time for turning on the electricity was 4:30 o'clock, P. M., on cloudy days, and 4:45 o'clock, P. M., on clear; that the day on which he was injured was clear; that he reached the lamp and commenced work at 4:15 o'clock, P. M., at which time, while at work on the wires, the current was turned on, and that he received the shock which caused the injury sued for, — the defendant is not entitled to a nonsuit, and the question of negligence or contributory negligence is for the jury. In such action an instruction that plaintiff had a right to believe and expect on that day that the current would not be turned on earlier than usual, that if the jury believe that on such day the current was turned on earlier than usual, and plaintiff was injured in consequence thereof, then defendant was negligent and plaintiff entitled to recover, is proper.

MASTER AND SERVANT.—**LIABILITY OF MASTER** must be determined by what took place before and at the time of the accident. What he did afterwards by way of precaution to avoid future accidents cannot be construed into an admission by him of previous neglect of duty. Therefore in an action for damages evidence that, after an accident causing the injury, the master put up warnings to employees not to engage in certain work after a certain hour, without first notifying his officers in charge, is inadmissible.

ACTION for personal injury to Lubbers. It appears that the Colorado Electric Company supplied lights for the city of Denver by means of electric fluid conveyed by elevated wires to different lamps used as burners. Lubbers was in the employ of said company as a carpenter, to assist in caring for its electric light tower; that on the day of the accident, at about 3:30 o'clock, P. M., he was sent by said company to remove one of its lamps, and connect the wires with the circuit; that it was the custom of said company at such time to turn on the electric current at 4:30 o'clock, P. M., on cloudy days, and at 4:45 o'clock, P. M., on clear days; that the day on which the accident occurred was a clear day, and that it was dangerous to handle the wires when the current was on; that Lubbers was inexperienced in the labor assigned him on that day, which was outside his regular employment; that he was sent to do the work on foot at a distance of from one and one fourth to two miles; that the time required to perform the work assigned, with ordinary speed, would be from thirty-five to

fifty minutes; that he proceeded to do the work at a "good gait, pretty fast," was not delayed on the way, or in the performance of the work; that before starting, the said company informed him that he would have time to do the work before the current was turned on; that after taking down the lamp and while connecting the wires the current was turned, he received a shock and fell a distance of twelve feet, thereby receiving the injuries complained of; that he was given no appliances to do the work with, nor any instructions how to do it; that although he knew that it was dangerous to handle the wires when the current was on, he did not know that a "jumper" could be used to cut off the current; that while using his hands to connect the wires the accident happened; that he had no time-keeper with him, but knew that when he started to do the work it was 3:30 o'clock, P. M., and that the current was turned on earlier than usual that day,—that it was nearer 4:15 than 4:30 o'clock, P. M., and that the accident happened between such hours; that at the time he sought to make the connection he believed that the current would not be turned on before the usual time, 4:45 o'clock, P. M., which time he believed had not arrived when he was injured. Upon this evidence said company asked for a nonsuit, on the ground that no negligence was shown against it, and that Lubbers was guilty of contributory negligence. Motion denied, as also motion for a new trial after verdict. The court instructed the jury against objection as follows: "The plaintiff had a right to believe and expect that on the day in question the electric current would not be turned on the wires earlier than usual, and if you believe from the evidence that on the day the electric current was turned on to the wires earlier than usual, and the plaintiff was injured in consequence thereof, then the company was guilty of negligence, and the plaintiff is entitled to recover." Verdict and judgment for Lubbers. Appeal by the company.

E. O. Wolcott, or the appellant.

William B. Mills, for the appellee.

DE FRANCE, C. We are of the opinion that no error was committed by the court in overruling the motion for a nonsuit, or in giving the instruction complained of. The questions of negligence and of contributory negligence were questions of fact to be determined by the jury from the evidence in the

case; and the instruction in question, when taken in connection with the testimony and the other instructions given, contains no error. The plaintiff was allowed to prove by the witness Geagan, over the objection of the defendant, that subsequent to the accident complained of the defendant put up certain hand-bills or placards at its works, warning all the employees engaged at work on its lines or circuits to quit such work at four o'clock, and to not continue the same without first notifying the officers at the works thereof. This was error, and we cannot say that the defendant was not prejudiced thereby. The liability of the defendant must be determined from what took place before and at the time of the accident. What it did afterwards in the way of precaution, to avoid future accidents, should not be construed into an admission by it of a previous neglect of duty: *Morse v. Railway Co.*, 30 Minn. 465, and cases there cited. For this error the judgment must be reversed.

STALLCUP, C., and RISING, C., concurred.

Per CURIAM. For the reasons assigned in the foregoing opinion, the judgment of the court below is reversed.

NEGLIGENCE, WHEN A QUESTION FOR JURY: *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Wallace v. Western etc. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346, and note 349; *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note 174; *Craver v. Christian*, 36 Minn. 413; 1 Am. St. Rep. 675, and note 680; *Orleans Village v. Perry*, 24 Neb. 831; *Needham v. L. & N. R. R. Co.*, 85 Ky. 423.

LIABILITY OF MASTER TO SERVANT FOR INJURIES RECEIVED OUTSIDE HIS REGULAR EMPLOYMENT: *Jones v. Old Dominion etc. Mills*, 82 Va. 140; 3 Am. St. Rep. 92; *Cole v. Chicago etc. R'y Co.*, 71 Wis. 114; 5 Am. St. Rep. 201, and note.

MASTER'S DUTY TO INSTRUCT AND WARN SERVANTS EMPLOYED IN DANGEROUS WORK: *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321, and note 330; note to *Smith v. Peninsular Car Works*, 1 Am. St. Rep. 548.

HAMMOND v. ROSE.

[11 COLORADO, 524.]

WATER RIGHTS.—**APPROPRIATOR OF WATER OF STREAM** for irrigation acquires a prior right thereto as against the riparian owner of land along such stream, who obtained patent for such land after such appropriation had been made, but before the operation of the amendment of July 9, 1870, to act of Congress of July 26, 1866, requiring that patents to public lands, thereafter to be issued, shall be subject to any vested or accrued water rights.

WATER RIGHTS.—**WATER OF STREAM CAN BE DIVERTED** by appropriation for irrigation to the exclusion of any riparian owner along such stream under the law in Colorado, even when the lands to be irrigated are not located on the banks, margin, or neighborhood of such stream.

WATER RIGHTS.—**COMMON-LAW DOCTRINE** giving riparian owner a right to the flow of the stream in its natural channel upon and over his lands, even though he makes no beneficial use of it, is inapplicable to Colorado. The first appropriator of water from the stream for a useful purpose has, subject to constitutional and statutory qualifications, a prior right thereto, to the extent of his appropriation, and this right is entitled to protection as well after patent to a third party of the land over which the stream flows as when the land is a part of the public domain. The right acquired by prior appropriation is not dependent upon the *locus* of its application to the beneficial use designed.

J. B. Cochrane, for the appellant.

John Campbell, for the appellees.

RISING, C. The appellees, who were defendants below, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff standing on his complaint, judgment dismissing the action and for costs was entered. It is alleged in the complaint that the plaintiff is the owner in fee-simple of certain lands lying on both sides of Cheyenne Creek, which lands were granted to Marcus A. Foster by patent from the United States, December 1, 1865, and that plaintiff claims title as a remote grantee of said Foster; that in 1882 certain parties, under whom defendants claim the water rights in question, diverted the water from said creek for irrigation purposes; that the water so diverted would naturally flow through and across said lands; that defendants are daily diverting all the water from the bed of said stream at a point on the same above his said lands, and that the lands irrigated by defendants, with the water so diverted, are not situated on the banks of said stream, or in the neighborhood thereof, but on the banks of the Fountain River, which is a different stream.

The patent issued to said Foster is set out in the complaint, and it does not contain any reservation or exception of vested water rights. Error is assigned upon the ruling on the demurrer, and two questions are presented: 1. Can an appropriation of all the water of a stream be sustained, as against a riparian owner of lands situated on the stream from which the water is diverted, who obtained a patent for such lands from the United States after such appropriation had been made, and before the amendment of July 9, 1870, to the act of Congress of July 26, 1866, went into operation, which amendment requires that patents to public lands, thereafter to be issued, shall be subject to any vested or accrued water rights? 2. Under the statutes of this state, can the water of a stream be diverted by appropriation to the exclusion of any owner of lands on said stream, if the lands to be irrigated therewith are not located on the banks, margin, or in the neighborhood of such stream?

Since the commencement of this action the questions presented have been passed upon by this court in *Coffin v. Ditch Co.*, 6 Col. 443. In that case it was held that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use of it, is inapplicable to Colorado; and that the first appropriator of water from a natural stream for a beneficial purpose has, in the absence of express statutes to the contrary, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation; and that this right is entitled to protection as well after patent to a third party of the land over which the natural stream flows as when such land is a part of the public domain; and it was further held that the right to water acquired by prior appropriation is not in any way dependent upon the *locus* of its application to the beneficial use designed. The questions determined in *Coffin v. Ditch Co.*, *supra*, are identical with the questions raised on this appeal, and such determination is in accord with the ruling on the demurrer. We do not feel called upon to enter into a discussion of these questions upon the merits. The judgment should be affirmed.

DE FRANCE, C., and STALLCUP, C., concurred.

Per CURIAM. For the reasons assigned in the foregoing opinion, the judgment of the court below is affirmed.

LAW RELATING TO PRIOR APPROPRIATOR'S right to water as against a riparian proprietor, as stated in the principal case, and as applicable to the Pacific coast states, is fully stated and discussed in *Wheeler v. Northern Col. Irr. Co.*, 10 Col. 582; 3 Am. St. Rep. 603, and note 615; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and note 797, and in the cases cited in the notes thereto.

GEROW v. CASTELLO.

[11 COLORADO, 560.]

CONDITIONAL SALE. — WRITTEN CONTRACT FOR LEASE of a piano of a certain value, subject to conditions that it shall be paid for by the party in possession in certain monthly payments; that in default of such payments the piano should either be returned to the owner or interest paid on such deferred payments, at his election; that the piano shall not be removed from the premises without the consent of the owner; that no agreement of sale is implied, nor shall a sale or purchase be deemed valid, without the written receipt of the owner, — is a conditional sale, and not a chattel mortgage, under which the vendor can recover possession of the piano for failure to comply with the conditions of the sale, or recover from the purchaser of such vendee who purchased with full knowledge of the nature and character of his vendor's title.

ACTION by plaintiff against defendant to recover a piano or its value. The action is based upon the following agreement and statement of facts: —

“LEASE OF PIANO-FORTE.

“This is to certify that I, Carrie Fetter, have this day leased of Philip Gerow, of Silverton, San Juan County, Colorado, an upright piano, marked ‘Lyon and Healy, Chicago, No. 7279,’ valued at three hundred dollars in United States currency, subject to the following conditions, to wit: Fifty dollars to be paid by me to Philip Gerow on April 28, 1883, and fifty dollars to be paid on the twenty-eighth day of each month thereafter for five months, with interest on regular deferred payments at the rate of one and a half per cent per month. And should I fail to make any of the above payments as specified, I hereby agree to surrender and return said piano-forte to Philip Gerow in as good condition as when received, customary wear and tear by careful usage excepted; provided that if I am not required to surrender said piano-forte at once upon a failure to make any payments when due, I agree to pay to said Philip Gerow one and one half per cent per month on such deferred payments until paid. And I further agree that said piano-forte shall not be removed from the premises known

as '557' (in the town of Silverton, Colorado, now occupied by Carrie Fetter, for any purpose or use whatsoever, removal from danger of fire excepted), without the consent of Philip Gerow. No agreement of sale of said piano-forte is implied, nor shall a sale or purchase of it be deemed valid without a written receipt from said Philip Gerow therefor. In witness whereof I have set my hand in Silverton, San Juan County, Colorado, this twenty-eighth day of April, A. D. 1883.

"PHILIP GEROW.

"CARRIE FETTER.

"Witness to Gerow's signature:—

"THOMAS BROWN."

Filing on back of agreement:—

"No. 21,161. Lease. Philip Gerow to Carrie Fetter. Piano.

"State of Colorado, County of San Juan, ss.

"I hereby certify that this instrument was filed for record in my office at 5:30 o'clock, P. M., April 28, 1883, and duly recorded in book 62, page 239.

"H. B. ADSIT, Recorder.

"THOS. BROWN, Deputy.

"Fees, \$1.50, paid.

"That said Carrie Fetter, during her said possession, transferred, sold, and turned over said piano to defendant for value, and left the country; that said Carrie Fetter was, on the first day of September, 1883, in default of the payments due at said time, the sum of one hundred dollars only having been paid on said agreement, the same being the first two payments; that demand was duly made upon the defendant by plaintiff previous to the bringing of this suit, and a refusal by defendant; that no payments of the amounts so in default under said agreement have ever been made to plaintiff; that the defendant, at the time of her purchase, knew of the nature and character of the title which the said Carrie Fetter at the time had to said piano; that by a proper construction of said agreement between the plaintiff and the said Carrie Fetter, and that it was the intention and understanding of said parties, that the said Carrie Fetter would be entitled to a bill of sale to said piano upon the performance by her of the conditions of said agreement."

Gray and Frazier, for the appellant.

RISEING, C. The written contract, executed by Gerow and Fetter, is not a chattel mortgage, or a substitute for one. None

of the requirements of the law regulating the execution of such instruments were observed in its execution: *Lucas v. Campbell*, 88 Ill. 447, 450. For this reason the provisions of the chattel-mortgage act have no application to this case. The contract shows a conditional sale of the piano therein mentioned: *Murch v. Wright*, 46 Id. 487; 95 Am. Dec. 455; *Lucas v. Campbell*, *supra*. Such conditional sale of the piano gave to the vendor the right to maintain an action against said vendee for the recovery of the possession thereof upon her failure to comply with the conditions of such sale; and the question presented for determination is, whether such vendor can maintain such action against a purchaser who purchased with the full knowledge of the nature and character of the title which said Fetter had at the time of such purchase. None but *bona fide* purchasers are protected against the claims of any one having an interest in the property adverse to the interest of the vendor, and if a purchaser purchases with notice of such interest, he is not a *bona fide* purchaser: Wade on Notice, secs. 67, 71; *Ketchum v. Watson*, 24 Ill. 592; *McKee v. Mining Co.*, 8 Col. 392, 395. Appellee, having purchased the piano with full knowledge of the nature and character of her vendor's title thereto, and fraudulent conduct in the premises, and of appellant's interest in the property, cannot be held to be a purchaser in good faith, so as to protect her against an action brought by appellant to enforce his rights, and to protect his interest therein. The judgment should be reversed.

STALLCUP, C., concurred. DE FRANCE, C., dissented.

PER CURIAM. For the reasons assigned in the foregoing opinion, the judgment of the court below is reversed.

CONTRACTS FOR LEASE OF PIANOS and other property, providing for payment by installments, are generally held to be conditional sales, with the rights and liabilities which grow out of the latter transactions: *Latham v. Sumner*, 89 Ill. 233; 31 Am. Rep. 79; *Hine v. Roberts*, 48 Conn. 267; 40 Am. Rep. 170; *Loomis v. Bragg*, 50 Conn. 228; 47 Am. Rep. 638; *Singer etc. Mfg. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 20; *Miller v. Steen*, 30 Cal. 402; 89 Am. Dec. 124, and extended note 127.

CONDITIONAL SALE. — Where vendor agrees to sell to vendee personally for a price to be paid in the future, and delivers possession, yet expressly retains title until payment, it is a conditional sale, not a chattel mortgage: *McComb v. Donald's Adm'r*, 82 Va. 903.

WATSON v. LEDERER.

[11 COLORADO, 577.]

EXEMPTIONS. — HORSE, WAGON, AND HARNESS belonging to a single man engaged in assaying, sampling, and working ores, and necessary for the purpose of carrying on his trade and business, are exempt from execution under section 32, page 602, General Statutes of Colorado, exempting from levy and sale the tools, implements, working animals, and stock in trade, not exceeding three hundred dollars in value, of any mechanic, miner, or other person, not the head of a family, and used and kept to carry on his trade and business.

JUDGMENT AGAINST OFFICER FOR SEIZING EXEMPT PROPERTY is error, where such officer has released a portion of the property seized, and the evidence fails to show that the released property in value did not reach the limit allowed by the statute as exempt from execution.

Amos J. Rising, for the appellant.

BECK, C. J. The appellant, as constable of Silver Cliff precinct, Custer County, on January 12, 1884, by virtue of an execution against the appellee, seized certain articles of personal property belonging to the latter, which were by him claimed to be exempt from execution under the statute. No brief is filed in behalf of the appellee, but the record shows that he informed the officer, prior to the levy of his writ, that he claimed all the property subsequently levied on by him to be exempt from execution. An assaying apparatus, being a portion of the property levied upon, was afterwards released by the officer, and the appellee then brought suit against him in a justice's court for three times the value of the remainder. The articles enumerated in the claim filed in the justice's court were a horse, harness, and a wagon commonly called a "buckboard." The complaint alleged that the plaintiff was a single man, and was engaged in the business of assaying, sampling, and working ores, and that he kept and used all the property seized for the purpose of carrying on his trade and business. The justice gave judgment of nonsuit, but, upon appeal to the county court, the claim of the plaintiff was sustained, and judgment rendered against the officer for the sum of \$210, being treble the value of the property last above mentioned. The errors assigned are, that the judgment was not warranted or sustained by the evidence. Two points are raised by the appellant as to the sufficiency of the evidence, namely: 1. It does not appear therefrom that the plaintiff comes within the class of persons mentioned in the statute as entitled to claim and hold property exempt from execution; 2. The evidence fails to show the value of that portion of the

property seized and afterwards released by the officer, which leaves it wholly uncertain whether the remaining articles were exempt or not.

In the examination of the first question, a construction of the exemption statute becomes necessary. That portion of it under which the exemption claim in this case is founded reads as follows: "And provided, also, further, that the tools, implements, working animals, and stock in trade, not exceeding three hundred dollars in value, of any mechanic, miner, or other person, not being the head of a family, used and kept for the purpose of carrying on his trade and business, shall be exempt from levy and sale on any execution or writ of attachment while such person is a *bona fide* resident of this state": Gen. Stats. 602. At the date of the levy this was the only provision of the statute which exempted from execution or attachment property other than wearing apparel of persons who were not heads of families. For the appellant it is urged that the appellee does not come within the class of persons herein specified, for the reason that he is neither a mechanic nor a miner; and for the further reason that the words "or other person" limit the benefits of the provision to persons of like business as those named, according to the maxim *noscitur a sociis*, which excludes the plaintiff from the protection of the statute, its language not being descriptive of the business in which he was engaged. Appellant's counsel contends that, in order to entitle a person to exemption under the designation "other person," he must follow a trade or business of the same class or kind as a mechanic or miner, and must earn his livelihood by his manual labor as a skilled artisan or handicraftsman. We are of the opinion that the statutory provision in question is not capable of such a narrow construction, and therefore cannot adopt it. Being added as a proviso, a reference to the body of the exemption statute becomes necessary to its correct interpretation. The body of the act is embraced within nine subdivisions preceded by this paragraph: "The following property, when owned by any person being the head of a family, and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment, or distress for rent; and such articles of property shall continue exempt while the family of such person are removing from one place of residence to another within this state": Gen. Stats., p. 601, sec. 32. Of the nine subdivisions following, four only can be claimed to be contingent

upon the kind of trade or business pursued by one who is the head of a family, residing with the same. These are as follows: "6. The tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value; 7. The library and implements of any professional man, not exceeding three hundred dollars; 8. Working animals to the value of two hundred dollars; 9. One cow and calf, ten sheep, and the necessary food for all the animals herein mentioned for six months, provided or growing, or both; also one farm wagon, cart, or dray, one plow, one harrow, and other farming implements, including harness and tackle for team, not exceeding fifty dollars in value."

The language of the first five subdivisions is general, and applicable alike to all heads of families residing with the same, irrespective of the occupation or business in which they may be engaged. The remainder, saving perhaps the first clause of the ninth subdivision, are further dependent upon the business pursuits of such persons. The clear intention of the framers of this statute appears to have been to exempt from levy and sale on execution, writ of attachment, or distress for rent, those articles of personal property commonly and necessarily used by the different classes of persons designated, in carrying on the various vocations by means of which they obtain sustenance for themselves and families. It will be observed that specific provision is made for the miner as well as the mechanic and the artisan; and for the farmer and teamster as well as for the professional man.

Referring now to the proviso, we perceive that it embraces the same classes of persons and the same character of pursuits described in the last four subdivisions of the act,—the essential difference being in the amount or value of the property exempted, and in the fact that the latter provisions are for the benefit of persons who are not heads of families. That the protection provided was only designed for the skilled laborer is controverted by the letter as well as the spirit of the statute. The man whose business is to till the soil does not "earn his livelihood by his manual labor as a skilled artisan or handicraftsman," but he comes within the protection of the statute. So does the miner, although he is not necessarily either a mechanic, handicraftsman, or artisan. The term "miner" is defined by Webster to be "one who mines; a digger for metals and other minerals." While men of scientific

attainments or of experience in the use of machinery are to be found in this class, yet the word by which the class is designated imports neither learning nor skill. It appearing, then, that provision is made in the several subdivisions comprising the body of the act for the skilled and the unskilled, the learned and the unlearned, and these several subdivisions being grouped together in a single sentence in the proviso, the application thereto of the maxim *noscitur a sociis*, instead of limiting its provisions to skilled labor only, extends them to the members of all lawful vocations who earn their livelihood by their own exertions, whether manual or mental, and who necessarily use, in the due prosecution thereof, specific articles of personal property of like character with those specified in the statute. This does not include articles of merchandise; and no opinion is now expressed concerning the import of the term "stock in trade," as used in the statute. Our construction of the statute does not conflict with the point decided in *Bevitt v. Crandall*, 19 Wis. 610, that a person cannot, by multiplying his occupations, claim exemption for each. It was not designed to exempt property for the same individual both as a farmer and a mechanic, or as a miner and likewise as a professional man, but that every person entitled to protection should come within one of the classes designated. Persons of different occupations, however, may usually and necessarily employ therein articles of property of the same general description as tools, implements, and working animals, and severally be entitled to claim exemption therefor.

The business of the appellee, as described by himself, and not contradicted, was of a mining character, and was conducted and carried on as follows: His assaying apparatus was located at a point called "Dora," in Custer County. He was accustomed to drive around to the different mines in the vicinity, with his horse and wagon, for the purpose of obtaining samples of ores from the various dumps. He would take from fifty to one hundred pounds from each, haul the several samples to Dora, where he would assay them for the purpose of ascertaining their composition and the value of the dumps from which they were taken. He would then either purchase these dumps, or contract to treat the ores for the owners at stipulated prices. Although the owner of no other property than the assaying apparatus and the horse, harness, and wagon, he had an arrangement with the owner of a concentrator at Dora, whereby, in consideration of employing his own

property in the mode and for the purpose stated, and of acting as manager in the operation of the concentrator, he shared in the net profits realized by its operations. He testified on the trial that these several transactions comprised his regular business, and the testimony not being controverted, it appears that the horse, harness, and wagon were as essential to his business as the assaying apparatus. The whole property owned by him was therefore exempt, provided it did not exceed three hundred dollars in value.

This leads us to the consideration of the second point raised and discussed by the appellant, concerning the sufficiency of the evidence to sustain the judgment. This point is well taken, and fatal to the judgment. There is nothing to show the value of the property released by the officer from the levy. Its value alone may have reached the limit allowed by the statutory provision. In the absence of such proof, the plaintiff was not entitled to recover. The judgment is therefore reversed, and the cause remanded.

HORSE WHEN NOT FREE FROM EXECUTION under exemption laws: *Elencoe v. Dunn*, 44 Conn. 93; 26 Am. Rep. 430; *Wallace v. Collins*, 5 Ark. 41; 39 Am. Dec. 359; *Hanna v. Bry*, 5 La. Ann. 651; 52 Am. Dec. 606; *contra*, *Seaton v. Marshall*, 6 Bush, 429; 99 Am. Dec. 683.

WAGON AND HARNESS, whether exempt from execution: *Richards v. Hubbard*, 59 N. H. 158; 47 Am. Rep. 188.

DAVIDSON v. FISCHER.

[11 COLORADO, 583.]

LANDLORD AND TENANT — PATENT DEFECTS IN TENEMENT. — Where a building with crumbling and defective walls is leased by a tenant having ample opportunity to observe and ascertain their true condition, the landlord is not liable to the tenant for damages caused the latter by the fall of such walls, in the absence of express warranty of safeness, or of fraud or misrepresentation.

LANDLORD AND TENANT — DEFECTS IN TENEMENT. — In the lease of a building there is no implied warranty that it is safe, suitable for habitation, or properly adapted to the uses to which it is applied, nor that it shall continue fit for the purposes for which it is demised.

LANDLORD AND TENANT — PATENT DEFECTS IN TENEMENT. — Where the tenant is permitted to examine fully the condition of the tenement sought to be leased, and any defects existing therein are patent, the rule of *caveat emptor* applies, and the landlord is exempted from liability for injuries caused by such defects in the building, in the absence of warranty, fraud, deceit, or misrepresentation.

Browne and Putnam, for the plaintiff in error.

Stallcup and Shaffroth, for the defendant in error.

GERRY, J. This case was tried in the superior court of the city of Denver, and a judgment of nonsuit, on motion of the defendant, was entered by the court therein, and the order made by the court below is assigned as error in this court. The complaint substantially alleges that the defendant, in the month of July, 1880, demised and let to the plaintiff, for the term of six months, a certain storeroom and cellar in the city of Denver, for a rental of \$150 a month, to be paid monthly in advance; that plaintiff at once took possession of said building, and expended large sums in fitting up the same as a saloon, and occupied said building for this purpose until the twenty-third day of September, 1881, at which time said building fell and destroyed the property of plaintiff situated therein, of great value, thereby damaging her to the sum of three thousand dollars; that the fall of said building was the direct result of the decayed and unsafe condition of its foundation, and that defendant was fully apprised, prior to the letting of said building, that its foundation walls were in an unsafe condition, and that this fact was not in any manner communicated to plaintiff, nor did she have any knowledge of the same prior to the fall of said building and the damage complained of. The answer specifically denied each material allegation of the complaint, and the cause came on for trial before a jury upon the issues thus joined. The evidence conclusively proved the letting to the plaintiff of the premises described; the expenditures by her made for fixtures, ornaments, and furniture; her entry into the possession of the premises; the uses to which it was applied; its fall at the time named in the complaint; and the damage proximately resulting to the property of the plaintiff from the fall of said building. Several witnesses on the trial testified as to the condition of the walls of the said building, both before and after its fall; and two witnesses, George W. Brown and Fred Ohlman, testified that they had examined the foundation walls of said building at the instance of the defendant herein, and each reported to her that the same were unsound and unsafe before the letting in this case. The evidence shows beyond controversy that the plaintiff was not informed by the defendant, or any one in her behalf, of the unsafe and unsound condition of said building prior to the time of her entry therein; that the plaintiff after entering

into possession of the demised premises had full control thereof, and frequently passed into said cellar, which was too damp to be used, and also into the alley adjoining said building, where witnesses claim that defects in the wall were plainly visible, and had ample opportunities to observe and ascertain the true condition of said building. Under this evidence, and the issues herein joined, the court granted the order of nonsuit, evidently acting upon the theory that the evidence disclosed that whatever defects existed in the walls or foundation of said building at the time of letting were not latent, but, on the contrary, of such a nature that the defendant must necessarily have been apprised of their existence; and the parties dealt with each other at arms-length. In this case there was no express warranty that the building was safe and adapted to the uses to which the plaintiff designed to apply the same, and no actual fraud or misrepresentation. Therefore, if any liability exists, it does not arise from any contract entered into between the parties, but arises by operation of law from a neglect to perform a duty which the law imposes.

In the lease of a store, dwelling, or other building there is no implied warranty that the building is safe, suitable for habitation, or properly adapted to the uses to which it is applied, nor that it shall continue fit for the purposes for which it is demised. This principle and the reasons for the existence of the rule are so well settled that it is useless to discuss the same: *Vide Dutton v. Gerrish*, 9 Cush. 89; *Mullen v. Rainear*, 45 N. J. L. 520; *O'Brien v. Capwell*, 59 Barb. 497; *Doupe v. Genin*, 45 N. Y. 119; 6 Am. Rep. 47; *Bowe v. Hunking*, 135 Mass. 380; 44 Am. Rep. 471; *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229. The courts, in the administration of justice, have recognized some exceptions to this well-known rule, and exceptions not based on deceit or misrepresentations, but purely on the doctrine of doing or omitting to do an act in violation of a legal duty or obligation. Thus *Minor v. Sharon*, 112 Mass. 477, 27 Am. Rep. 122, and *Cesar v. Karutz*, 60 N. Y. 229, were both cases in which apartments were let, infected with small-pox. In the first case the jury found that the lessor concealed his knowledge that the tenement was so infected, so as to induce the lessee to hire and occupy it. In the latter case it does not appear that there was any intentional concealment, and the decision rests upon the failure of the defendant to disclose the fact that the tenement was so infected. Says the court in the case of *Bowe v. Hunking*, 135

Mass. 380, 44 Am. Rep. 471: "When a house is infected with small-pox, the danger to life is from a cause that cannot be discovered by the tenant from any examination he may make. It is obvious that there may be other concealed sources of mischief about the house which no examination can discover. Spring-guns might be set in it; traps or other contrivances might exist, which would injure the most careful occupant. If the landlord knew of such, it might be held to be his duty to give such information to the tenant. Such traps or contrivances are not merely a want of repair; they are in a sense active agents of mischief, which no tenant would expect to find, even in a decayed and ruinous tenement." It is not settled how far the exception to this general rule may extend, and we do not feel called upon in this opinion to define its limits, for the case at bar does not fall within the exception. The ruinous condition of the wall in this case was not a latent defect, one of which it was the legal duty of the lessor to apprise the lessee, for from the evidence it was patent to the most casual observer. The cellar at the time of the letting was so filled with water as to be unfit for use, and the walls of the building were literally crumbling away. The witness Fred Ohlman examined the demised tenement in this case before the letting, and testified upon the trial of the case in the court below as follows: "Q. How did you go to work to examine the walls? A. Well, I could examine that from the outside; I need not go inside; the outside walls were crumbling out. Q. You discovered that by going through the alley on the outside,—by looking at it? A. Yes, sir. Q. Did you dig in it? A. No; I examined here and there. It was all about a foot above the ground in the alley there; the brick was all under water. Q. So you did not have to make any careful examination to see it? A. No." This is the evidence introduced by the plaintiff, and is not in conflict with any other evidence introduced in the cause, and therefore the plaintiff is bound by the same. Buildings of every description are let in all kinds of conditions, and the law exempts landlords from liability from injuries caused by defects in such buildings, in the absence of any warranty, and where there is no fraud, misrepresentation, or deceit. When the tenant is permitted to examine fully the condition of the tenement sought to be leased, and any defects existing herein are patent, then the rule of *caveat emptor* applies.

Judgment affirmed.

LESSEE TAKES RISK OF QUALITY OF PREMISES leased, in the absence of express or implied warranty, or of deceit on the part of the lessor, and cannot ordinarily maintain an action against him for injuries sustained by reason of their defective condition, but the lessor is liable if the lessee is injured through concealed and dangerous defects known to him, and which a careful examination by the lessee would not discover: *Cowen v. Sunderland*, 145 Mass. 363; 1 Am. St. Rep. 469, and note 471.

IN LEASE OF BUILDING THERE IS NO IMPLIED WARRANTY that it is safe, well built, or fit for any particular use: *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229, note; note to *Carson v. Godley*, 67 Id. 412; *Fisher v. Lighthall*, 4 Mackey, 482; 54 Am. Rep. 258; *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

POTTER'S APPEAL.

[56 CONNECTICUT, 1.]

EXECUTOR ACTING WHERE HIS INTERESTS ARE CONFLICTING. — If an executor, having in his hands funds of the estate, advises the widow of the decedent, who is acting both for herself and as guardian of a legatee, to invest moneys of the estate coming to them in certain stocks and mortgages, and he, unknown to her, receives a commission for disposing of such stocks and mortgages, she has the right, on discovering that the executor acted from motives of self-interest, to repudiate and rescind the transaction on behalf of herself and the legatee whom she represents as guardian.

EXECUTOR AND ADMINISTRATOR — REPUDIATION OF PAYMENT OF LEGACY — RIGHT OF, LOST BY DELAY. — Where an executor sells a railroad bond in which he has no interest to a widow, as guardian, as payment to a legatee, she cannot repudiate the purchase after three years' delay, though she might have repudiated it at the time of the transaction, as property in which she had no right to invest guardian funds.

EXECUTOR AND ADMINISTRATOR — PARTIAL ACCOUNTING NOT CONCLUSIVE. — Where an executor has made a partial accounting, without the presence of or notice to the parties interested, and not otherwise passed upon by the court than by its acceptance of it, the question of allowance or disallowance of items included in that accounting is an open one on the final accounting.

H. S. Sanford and C. Thompson, for the original appellant.

G. Stoddard and W. T. Haviland, for the original appellee.

PARK, C. J. Mr. Potter, the original appellant, was executor of the will of Ezra Curtis, and in that capacity had, in April and July, 1882, a large sum of money in his hands for payment to the legatees under the will. The legatees were Mary E. Curtis, the widow, and George E. Curtis, his son and

only child, then twelve years old, of whom the widow was the legally appointed guardian. In paying over portions of their shares to the widow on her own account and as guardian of her son, he advised her to take, and she, relying upon his advice and recommendation, took, for herself one hundred shares of the Housatonic Rolling Stock Company at fifty dollars a share, coming to five thousand dollars, and Missouri farm mortgages to the amount of \$1,961.55, and as guardian of her son, one hundred shares of the Housatonic Rolling Stock Company at the same price, coming to five thousand dollars, a thousand-dollar bond of the Atchison and Pike's Peak Railroad Company at its face value, and Missouri farm mortgages to the amount of \$1,970.34, making a total for herself of \$6,961.55, and, as guardian of her son, of \$7,970.34. For these two sums, Mr. Potter credited himself in his account with the estate as executor, and presented the items for allowance by the probate court in a partial account rendered on the 14th of June, 1884, which account was accepted by the court. In his final account as executor, rendered to the probate court on the twenty-second day of March, 1886, these items were objected to by the widow on her own account and as guardian of her son, and were disallowed by the court. From that disallowance Mr. Potter took the present appeal to the superior court, which affirmed the probate decree in part and in part disaffirmed it, and from that judgment both parties have appealed to this court.

The court below made a finding of the facts in the case, from which it appears that Mrs. Curtis, the widow, prior to her husband's death, had had no business experience whatever; that friendly relations had existed between her husband and Mr. Potter, of which she had known, as well as the fact that he had selected him for his executor; that she did not, in any respect, assume the management of the estate, or direct as to investments of it, but relied entirely upon Mr. Potter, and assented to and accepted such investments as he recommended; and that she had no knowledge that Mr. Potter had any interest in her making the investments that have been mentioned, and that she would not have assented to them if she had known their character, and that they were not securities in which she could lawfully invest funds held by her as a guardian, but that she relied in the matter upon Mr. Potter's advice and recommendation, and upon his relations to the estate.

Here we have, then, a widow, utterly ignorant of business, confiding in one whom she had known as her husband's personal friend, and whom he had trusted with the settlement of his estate, and acting upon his advice, supposing, as she had a right to do, that he was disinterested in that advice, and was acting solely in her interest, and giving her the benefit of his experience and intelligence, with the most friendly interest in her welfare. He, on his part, stood in a position as executor of her husband's estate, and, as such, a trustee for the legatees under his will, and as the recipient of her confidence and trust with regard to her business affairs, that imposed upon him the obligation of the highest fidelity to her interests, and rendered impeachable in equity any transaction into which she might be led by any want of such fidelity on his part.

Now, what do we find the actual fact to be? The stock of the Housatonic Rolling Stock Company was a speculative stock, of the character or value of which it is found that Mr. Potter knew nothing, except that it was largely invested in by prominent and responsible citizens of Bridgeport, and that it was at that time paying good dividends, and that the manager told him it would continue to do so, and that he sought no further information on the subject. It is found, however, that it was not an incorporated company, but was managed as an unincorporated association entirely by one Hurd. This is a fact that Mr. Potter, himself a stockholder, could easily have ascertained, and was bound to have ascertained before assuming to advise an investment in it by Mrs. Curtis, who, as a stockholder, might be held in law a partner, and so might be subjected to great and perhaps ruinous loss by its insolvency. As a matter of fact, the company paid dividends but two years longer, and at the time of the trial, the stock was worth only from five to seven dollars a share.

We have, then, thus far, conduct on the part of Mr. Potter that is really inexcusable in his advising Mrs. Curtis, to whom he stood in such a relation of confidence, to invest in such a precarious stock; and it is a serious question whether, if this were all, the transaction could stand in equity. But there is a further feature of the case that places the invalidity of the transaction beyond question. It is found that, at the time of these transactions, Mr. Potter was and for some time had been, agent for Hurd, the manager of the Rolling Stock Company, for the sale of the stock, and that he was allowed a

commission of twenty per cent on the sales which he effected, and that he, in fact, received two thousand dollars for the sale of the two hundred shares which he sold for ten thousand dollars to Mrs. Curtis for herself and as guardian of her son. It further appears that instead of Mrs. Curtis seeking his advice, he took the initiative, and sought an interview with her, inviting her to his house at dinner (stating that he had funds of the estate in his hands, but was not well enough to go to see her), and at the interview there he advised her to take this stock as an investment, which she finally did, in entire ignorance that he had an interest in effecting the sale. It is true, his interest was only to the amount of twenty per cent of the stock, and the claim is made that for the other eighty per cent the sale was good, and he liable to make good only the actual profit that he received. But this is a very narrow view of the matter. His interest in making the sale characterized and vitiated the whole transaction. It became, as a whole, a breach of confidence,—an abuse of trust. The matter is not to be measured by the measure of his interest, but is characterized throughout by the vicious ingredient that entered into it: 2 Pomeroy's Eq. Jur., sec. 902, and cases cited.

And the same reasons that invalidate this transaction apply to the sale to her of the farm mortgages. Mr. Potter had the same interest, as an agent selling upon a commission, in this transaction as in the one we have considered. His advice was not disinterested, nor such as in the circumstances she had a right to expect and require. The property in this case does not appear to have depreciated, but her right to repudiate the transaction does not rest upon a depreciation of the property, but on Mr. Potter's concealed interest in the sale. But the mortgages were in fact securities which, as a guardian, Mrs. Curtis had no right to invest in, and in which it was not wise that she, a woman ignorant of business, with whom the great point of consideration must have been safety of investment, should invest her means, and which he, as her confidential adviser, ought never to have recommended to her for that purpose. As the case stands thus far, both the transactions by which the Rolling Company stock and the mortgages were sold to Mrs. Curtis are open to arraignment in equity, and would be condemned by its well-settled principles.

And it is to be observed that courts of probate, though not properly courts of equity, have full power to apply equity principles in dealing with cases like this; so that the question

before the probate court in this case was precisely the same as if it had been brought before a court of equity by a direct proceeding.

But the counsel for Mr. Potter say that there was no fraudulent intent on his part, and appeal to that part of the finding which states that he "believed that all the statements made by him to Mrs. Curtis concerning them [the stock and securities] were true, and that they would be a safe and profitable investment for her and her son." But it is not enough that he believed his statements to be true. In the relation in which he stood to her, he ought to have known them to be so, or not to have made them. It appears that he knew the speculative character of the Rolling Company stock, and that there was no legal organization. And more than all, he knew that he was concealing from her his personal interest in the sales,—a fact which would have prevented her accepting the property if she had known of it. If the case can be regarded as not one of actual fraud, yet it clearly is one of constructive fraud,—of fraud inferred by the law. Such a fraud will be inferred in cases where a confidential relation is used to accomplish a transaction that is injurious to the trusting party, even though there be no actual fraudulent intent: 1 Story's Eq. Jur., secs. 307, 308, 311.

As to Mr. Potter's belief in the truth of his statements, it is to be noticed that with his very limited, and as far as it went not very favorable, knowledge of the affairs of the Rolling Stock Company, he "sought no further information on the subject." He therefore made his statements knowing that they were very hazardous ones. In *Evans v. Edmonds*, 13 Com. B. 777, Maule, J., lays down the rule on this subject as follows: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts." And Pomeroi in his *Equity Jurisprudence*, volume 2, section 885, says: "A person making an untrue statement without knowing it to be untrue, and without any intention to deceive, may be chargeable with actual fraud in equity."

It is then said that Mrs. Curtis had no right to retain the stock and mortgages so long, and ought to have tendered them

back, if at all, long before she did. Of course she was bound to repudiate the transaction within a reasonable time. Like all persons who appeal to equity for aid, or who seek to apply its principles for their protection, she had no right to sleep upon her rights. It is found that she tendered the stock and mortgages back, with all the dividends and interest received, in January, 1885, nearly three years after she took them. But it is also found that she then for the first time learned that he had received commissions for the sale of them. This was the point which was decisive as to the invalidity of the transactions, and the discovery of it gave her the right to repudiate the purchase. It surely does not lie in the mouth of Mr. Potter to complain that a decisive fact, which he concealed, was not sooner discovered by her, or that action which was predicated upon and justified by that fact was not sooner taken.

It is then said that these transactions, even if fraudulent, either in fact or in law, were wholly outside of Mr. Potter's relation to the estate as executor, and were merely between him and Mrs. Curtis, and if to be assailed at all, that they are to be assailed by her by some proceeding of her own, and subjecting him personally, if at all, and not as executor of Mr. Curtis.

The idea here seems to be, that Mr. Potter had completed his duty as executor in paying over the money to Mrs. Curtis, and that her use of the money was wholly her own matter, and so far as she acted under his advice, it was his individual advice and not his as executor. If the facts were as claimed, it would yet not deliver Mr. Potter from personal responsibility to Mrs. Curtis. The confidential relation might continue to exist after the official relation had ceased. A guardian might, on the ward's becoming of age, have paid over to him in cash, or delivered to him in specific property of the estate, all that he held as guardian, and have obtained a discharge from his guardianship by the court and a receipt in full from the ward; and yet if the ward a few days later had asked his advice as to the investment of his money, the confidential relation would ordinarily have continued to exist, and any abuse of the ward's confidence by which the late guardian had promoted his own interest and brought loss upon the ward would have been a transaction that a court of equity would set aside. This, Mr. Potter's counsel would not deny; but they say that, as in the case supposed, the guardian would no longer be liable on his bond, but only upon a suit of the ward against him, so here

Mr. Potter would be liable, if at all, only to Mrs. Curtis personally, and not for a breach of his bond as executor, or upon objection made to an allowance of his administration account. But the facts do not at all bear out this claim. Here the money was not paid to Mrs. Curtis, but she was paid in these stocks and securities. She was of course entitled to payment in money. This is not only clear as a matter of law, but it is found that "Mr. Potter knew that, as executor, he ought to pay the legacies in cash." His payment of her by check payable to her order was not only a mere form, but it is found that he took a receipt from her for cash because he knew that it was his duty to pay her in cash. In the case of the sale of the stock to her as guardian, he did not even resort to this form of payment, but made his check payable to Hurd, and procured from him and delivered to her a certificate of the stock, taking from her a receipt for a payment in cash; the court finding that he drew the check to the order of Hurd and not to her order because he thought it would be "a useless formality." It is clear that the payments to her on her own account and as guardian were in these stocks and securities, and not in cash, which she afterwards invested in the stocks and securities on his advice.

We ought, perhaps, to notice the point made by Mr. Potter's counsel, that Mrs. Curtis was not acting upon his advice alone, but that he advised her to consult her uncle, Mr. Bishop, and Mr. Lockwood; and that she did in fact consult Mr. Bishop. It does not appear what advice he gave her, nor whether any. The fact of Mr. Potter's advising her to consult these gentlemen should be set down to his credit upon the question of fraudulent intent on his part; but even if it be regarded as disproving such intent, it could not operate to disprove a constructive fraud. The transactions would still be open to a fatal objection. But it is not clear that the fact is of any great value upon the question of actual fraud. The court has not found that Mrs. Curtis was in any manner influenced by Mr. Bishop's advice, if, indeed, he gave her any, but has found expressly that Mr. Potter "induced" her to take the stock and securities, and that she took them "relying upon his advice and recommendation, and upon his relation to the estate." We cannot regard the case, therefore, as materially affected by the fact that he advised her to consult these two gentlemen, and that she did in fact consult one of them.

We have thus far considered only the sales of the stock of the Rolling Stock Company, and of the mortgages. It does not appear from the finding that Mr. Potter received any commission for the sale of the railroad bond, nor, indeed, who owned the bond, nor that the sale was not a fair one. It is true that it was not a security in which Mrs. Curtis had a right to invest the guardian funds in her hands, and Mr. Potter, if he knew that fact, did a blameworthy act in advising such an investment. But there appears no reason why, if she had desired to repudiate the transaction, she should not have tendered back the bond before she did. The long delay in the other cases was excused by her ignorance of his concealed interest in the sales; but no such interest appears to have existed in this case; and we think that even if the transaction was one which she would have had the right to repudiate if she had acted seasonably, she had lost that right by her delay.

The point was made before the probate court that the question as to the disallowance of these items of credit was no longer an open one, by reason of the account personally rendered to and accepted by the court, in which these items were embraced. It appears that this account was rendered on the 14th of June, 1884, the final account from which the appeal is taken having been rendered on the 22d of March, 1886. The former accounting was a partial one, and was made without the presence of or notice to the parties in interest, and was not otherwise passed upon by the court than by its acceptance of it. In these circumstances, it is very clear that the question as to the allowance or disallowance of these items was in every respect an open one on the final accounting: *Mix's Appeal*, 35 Conn. 121; 95 Am. Dec. 222; *Clement's Appeal*, 49 Conn. 520.

There was error in the judgment of the superior court in reversing so much of the decree of the probate court as disallowed as credits in the administration account of Mr. Potter the items pertaining to the sales of the Rolling Stock Company's stock and the farm mortgages to Mrs. Curtis, and to her as guardian; and no error in the affirmation of that part of the decree of the probate court which disallowed as credits the amount which he received as commissions on those sales.

RESCISSION OF TRANSACTION BY PRINCIPAL WHERE AGENT HAS ADVERSE INTEREST, OR IS IN SECRET EMPLOYMENT OF OTHER PARTY. — A party cannot act as agent where, on account of his own personal interests, he would

be compelled to assume incompatible and inconsistent duties and obligations. It is a fraud upon the principal, and contravenes public policy, to permit an agent, without the full knowledge and consent of his principal, to enter into a relation involving such duties, when his sole allegiance has already been pledged to one having adverse interests, or when his own personal interests would be antagonistic to his principal. The latter is entitled to the disinterested skill, diligence, and zeal of his agent for his own exclusive benefit. All this he presumptively contracts for, and the law will not tolerate the existence of a secret and undisclosed interest in the agent in conflict with that of his principal, on account of the temptation offered to the agent to sacrifice the principal's interests to his own. Therefore, it is an undisputed rule of law that, unless with the free and intelligent consent of his principal, given after full knowledge of all the facts and circumstances, the agent cannot, in the same transaction, act both for the principal and the adverse party. The rule is frequently applied to cases where the agent, while apparently acting only for his principal in the purchase or sale of property, is, in reality, acting under the commission of the contemplated purchaser or seller, and always applies to cases where the agent, being authorized to sell or buy property for the principal, secretly buys of or sells to himself: *Keighler v. Savage Mfg. Co.*, 12 Md. 383; 71 Am. Dec. 600, note 607; *Scribner v. Collar*, 40 Mich. 375; 29 Am. Rep. 541; *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 528; *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459; *Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Everhart v. Searle*, 71 Pa. St. 256; *Meyer v. Hanchett*, 39 Wis. 419; 43 Id. 246; *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168, and note; *Farnsworth v. Heminer*, 1 Allen, 494; 79 Am. Dec. 756; *De Steiger v. Hollington*, 17 Mo. App. 382. Where the agent endeavors to act in a double capacity, either having an adverse interest in the transaction or being in the secret employment of the opposite party, his conduct is a fraud upon his principal, and precludes him from recovering compensation for the services rendered, and renders the contract or dealings made or had by the agent, while so acting without the knowledge or consent of his principal, ineffectual to bind the latter. If the contract or transaction remains executory, the principal may repudiate it, or if it has been executed in whole or in part, he may, by acting promptly and before the rights of innocent third parties have intervened, restore the consideration received, rescind the contract, and recover the property or rights with which he has parted under it: *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722; *Hegenmyer v. Marks*, 37 Minn. 6; 5 Am. St. Rep. 808; *Herman v. Martineau*, 1 Wis. 151; 60 Am. Dec. 368, and cases cited in note 369; *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *Holcomb v. Weaver*, 136 Mass. 265; *Levy v. Loeb*, 85 N. Y. 365; *Fish v. Leser*, 69 Ill. 394; *Byrd v. Hughes*, 84 Id. 174; *Greenwood v. Spring*, 14 Barb. 375; *New York etc. Ins. Co. v. National etc. Ins. Co.*, 20 Id. 468; 14 N. Y. 85.

In the case last cited, the law is admirably stated as follows: "It has been settled by a long course of adjudications in the courts of equity that a trustee or agent of one person cannot make a valid contract respecting the subject-matter to which the trust or agency relates, where he has a personal interest. His constituent, it is said, is entitled to have all his skill and judgment employed in his service, but if he is himself the other party to the contract, the utmost which could be expected from a very honest man would be the ordinary fairness of an umpire. The courts of this state have followed the principle with great constancy, and the rule may be considered perfectly

well settled. It is not necessary for a party seeking to avoid the contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof of actual fraud. The principle has been most frequently applied to executed contracts and to sales of lands and goods, but in its nature it is equally applicable to executory contracts and to other subjects." And again, in *Mercantile etc. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 411, it is said: "The antagonism which exists between the opposite parties to a bargain is generally recognized by law. Each acts, and has a right to act, with a view to his own interest, and they deal at arms-length. Accordingly, if one acts by an agent, that agent should be, not nominally, but really, in the place of his principal, with his self-interest undisturbed by calculations as to the interest of the opposing party. This, as well as the exercise of the best skill and judgment of his agent as to the contingencies of the bargain, the principal has a right to demand. Accordingly, a contrivance which reduces the two parties to one, and admits an agent, representing antagonistic interests, to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with a knowledge of all of the circumstances that affect his possession, to ratify the act of his agent." In the same line of reasoning is *Barry v. Schmidt*, 57 Wis. 172; 46 Am. Rep. 35, and note. So in *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385, a lumber dealer secretly agreed to pay a builder employed to superintend the erection of buildings for others, and whose duty it was to pass upon accounts presented for materials furnished, but not to make purchases, a commission on all sales of lumber made to his employers through his influence, the court held the contract void as against public policy, saying: "One employed by another to transact business for him has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith toward his employer. The interests of the defendant's employers and those of the plaintiffs as buyers and sellers were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests. It makes no difference that defendant was not employed to purchase the lumber for his employers. It is enough that it was his duty, under his employment, to examine and certify to the correctness of the lumber bills. Under this view, it is wholly immaterial whether the agreement was ratified or not by the plaintiffs. The ratification of the contract would not have eliminated the element which rendered it invalid."

The rule as maintained in England is clearly stated in the case of *Panama & S. P. Tel. Co. v. India Rubber etc. Co.*, L. R. 10 Ch. App. 515, 14 Moak's Eng. Rep. 759, where a telegraph-works company agreed with a telegraph-cable company to lay a cable, the cable to be paid for by a sum payable when the work was begun and by a number of installments payable on certificates by the cable company's engineer, who was named in the contract. Shortly after, the engineer, who was engaged to lay other cables for another company, agreed with them to lay this cable also for a sum of money to be paid to him by installments payable by such other company when they received the installments from the cable company, and the court held that under the circumstances the agreement between the engineer and such other company was a fraud upon the cable company which entitled them to have their contract rescinded, and to receive back the money paid by them thereunder. In delivering the opinion, Sir W. M. James, L. J., said: "I have been of

opinion, and am now of opinion, that the right of the plaintiffs to the relief which they have asked, and which has been given them, is a matter of course, according to the view of the law which I have learned as student, practitioner, and judge for nearly half a century. According to my view of the law of this court, I take it to be clear that any surreptitiousness between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court. That I take to be a clear proposition, and I take, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled at his option to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the court may think it right to give him. It is said there is no authority and no *dictum* to that effect. The clearer a thing is the more difficult it is to find any express authority or any *dictum* exactly to the point. I doubt whether there could be found any authority or any *dictum* exactly laying down the first of the two propositions which I have mentioned, and which nobody has in the course of the argument ventured to dispute; that is, that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court. The other proposition as to the relief may perhaps not be found stated in so many terms in any case or in any *dictum*, but many cases may be suggested which probably will be equally without any authority, either in decision or *dictum*. . . . I am of opinion that where anything in the nature of a fraud, in the eye of this court, is committed, a man has the right at once to sever the connection; and I cannot bring my mind to doubt that if you find a case where, in the contemplation of this court, a principal is conspiring with the servant of the other principal to cheat his master in the execution of a contract, then, in common sense, common honesty, common justice, and in this court, the master is entitled to say, 'I will have nothing more to do with the business'; and in this court a surreptitious subcontract with the agent is regarded as a bribe to him for violating or neglecting his duty. . . . But I cannot content myself with disposing of this case merely on that general principle, and only saying that it is the general principal which has put aside and has cherished this contract. Although the parties may not have thought that they were doing anything wrong, yet when I put together the two contracts, the contract between the plaintiff company and the defendant company and the contract between the defendant company and Sir Charles Bright, the engineer, on the other side, and see that the money to be paid to Sir Charles Bright is not money to be paid when he has completed or is completing the subcontract as a reward for work and labor, but is money to be paid out to him time after time, exactly when and as he shall have certified money to have been due and payable by one company to the other, then I say that this is a contract as to which *res ipsa loquitur*, and of which I am bound to express my strongest disapprobation and reprehension." In the same case, Sir G. Mellish, L. J., says: "I am also of opinion that the judgment of the vice-chancellor ought to be affirmed." Then, after stating the facts and relations of the parties, he says: "I am not quite certain that I go the full length to which the lord justice has gone in thinking that because a person has been a party to a fraudulent act of this kind after the contract was made, the mere fact of his having been guilty of such fraudulent conduct, supposing that a full remedy for the fraud could be otherwise obtained, would entitle the other party to say, 'Because you have acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.' I am not aware of any authority which has gone to that extent.

As far as I know, the consequence of fraud is, that the court will see that the party defrauded obtains, as far as can be given, full redress for the fraud; and I have thought it, therefore, necessary on this part of the case to consider whether the plaintiffs could be relieved from the consequences of this fraud by anything short of the relief which the vice-chancellor has given to them. Now, I do not think it necessary to give a conclusive opinion whether at law there would be a defense on the ground that by the act of the defendants the performance of the contract has been rendered impossible. No doubt, it is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract; and certainly, according to the case of *Planche v. Colburn*, 8 Bing. 14, and other cases, it appears sufficient, if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different, still there may be a question of law in a case of this kind as to how far the certificate of the engineer would be considered so much of the essence of the contract that the plaintiffs, having been deprived of that, would be entitled at law to rescind the contract. But whether it is so or not, I am clearly of opinion that if by any fraudulent misconduct of the defendants in entering into an agreement with Sir Charles Bright, which had the effect of making it impossible to keep him as a disinterested engineer, — if by that it is rendered impossible that the plaintiff can have the full benefit of the contract, — then it appears to me that there is sufficient to entitle them to rescind the contract.”

So in *Smith v. Sorby*, 3 Q. B. D. 552, 28 Moak's Eng. Rep. 455, it was held that where a secret gratuity is given to an agent, with intent to influence his mind in favor of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by such gratuity into assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to that particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option. In the subsequent case of *Harrington v. Victoria etc. Co.*, 3 Id. 549, 28 Eng. Rep. 453, very similar to the foregoing case and citing it, Cockburn, C. J., says: “I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted or is about to contract with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the person who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. It would plainly be in contravention of the maxim, *turpi causa non oritur actio*, and most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one.” Mellor and Field, JJ., concurred in this opinion.

QUINN v. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

[56 CONNECTICUT, 44.]

OPINION AS EVIDENCE ON QUESTION OF CONTRIBUTORY NEGLIGENCE. — In an action against a railroad company for causing the death of an employee who was on a hand-car at the time that it came in collision with an extra train of defendant's, causing the accident, the defendant may ask a witness, who was a co-employee and on the hand-car at the time, and who had testified to all the facts relating to the matter in dispute, whether deceased had sufficient time to jump from the hand-car before the collision happened.

EVIDENCE — INCONSISTENT STATEMENTS OR CONDUCT OF WITNESS. — In an action against a railroad company for causing the death of an employee, after the superintendent of the company has testified that the rules and regulations in force at the time of the accident were the best that could be devised for such exigencies, he may be asked on cross-examination if he has not issued new rules and orders since the accident, to show inconsistency in his testimony.

W. K. Townsend and G. D. Watrous, for the appellant.

J. P. Pigott and W. S. Pardee, for the appellees.

LOOMIS, J. This is a suit to recover damages for causing the death of Michael Quinn, a track-repairer in the employ of the defendants on the Air Line Railroad. The court found that the death of Quinn was caused by the neglect of the defendant to provide a reasonable system of rules and regulations, and the execution of the same, relative to giving notice to its employees of the running of extra trains. It was also found that there was no contributory negligence on the part of the deceased, nor of any co-employee, unless it arises as matter of law on the facts.

At the time of the injury the deceased and three other track-repairers were in a hand-car going to their work, when an extra train suddenly appeared, coming towards them. All the men on the hand-car except the defendant jumped off before the collision and were saved, but the defendant remained and was killed in the collision.

One prominent ground of contention on the trial was, whether the deceased was guilty of contributory negligence. Upon this issue the defendant introduced Timothy Hayes, another of the gang of track-repairers, who was on the hand-car, who testified that he saw the engine about nine hundred feet away; that he called out to have brakes on the hand-car; that the car stopped, and that all got off except the deceased. The

witness stated at length and in detail all the facts relating to the matter in controversy, and was finally asked upon direct examination: "Was there, or was there not, time for Quinn to jump off?" and again: "State whether or not there was time for Quinn to jump off between the time when the order to brake was given and the time of collision." The defendant claimed these questions to show negligence on the part of the deceased.

The court states its ruling as follows: "If the testimony of the witness was true, it was manifest that the deceased had ample time to get off the car before the collision, and there was no occasion for the opinion of the witness. The court thereupon excluded the questions, for the reason aforesaid, and also upon the ground that the questions called substantially for the opinion of the witness as to the negligence of the deceased."

We cannot accept either the ruling or the reasons given as sound. The fact that Quinn had time to get off the car was material, if not absolutely controlling, upon the question of contributory negligence. The court directly in the face of the proposed evidence found that he "was unable to jump off the car in season to save himself," and thereupon negatived the existence of any contributory negligence as matter of fact.

The court gives two reasons for excluding the evidence. The first justifies the exclusion upon the assumption that the witness's evidence, as far as received, was true; the implied argument being that, if true, it proved beyond a doubt the fact which the excluded evidence was designed to prove, and hence no harm was done if the ruling was erroneous. It is, however, obvious that the reason as given was not operative. The court did not, in reality, assume or find the statements true; for, in repudiating a conclusion stated as the manifest one upon the assumption referred to, the court, in effect, repudiated the evidence already given, and found it untrue.

The controlling reason, therefore, was not expressed, but was an implied alternative; that is, the evidence as given was not true, and therefore any further evidence would not be believed, and hence, again, no harm was done. The counsel for the plaintiff, both in their brief and in argument, state the point in these words: "The witness was not telling the truth, and the court knew he was not, and his opinion would not have had the slightest effect on the court."

It seems to us that this reasoning is not only illegitimate, but unsafe and pernicious in its consequences. We may, perhaps, test the principle by applying it to the trial of the cause itself. How can a case be properly decided until it has been heard? And how can it be heard, where matters of fact are in issue, without a hearing of the witnesses? A partial trial is no trial; it is not having "a day in court." The whole case may depend on one witness, and such, for aught we know, was the case here. It will not do, therefore, to stop a witness while he is about to give important and relevant testimony, merely because the trial judge had imbibed an unfavorable opinion as to his truthfulness. Such early impressions, with the very best of judges, cannot always be avoided; but we think the experience of triers generally will confirm the statement that such impressions are often dissipated after further patient hearing.

This brings us to the second reason, which is the important one, Was the evidence admissible?

No claim is made that it was irrelevant to the issue; but the objection involved in this reason is twofold: 1. Whether the circumstances would allow the witness to give his opinion at all; and 2. Whether, if given, it would have amounted to an opinion as to the negligence of the deceased, which the court and not the witness was to decide.

Assuming that the answer involved an opinion, it was yet clearly admissible, for the time required for such sudden movements as are referred to it would be impossible to estimate in minutes or seconds with any approximation to accuracy; but every observer familiar with the running of trains and hand-cars, as this witness was, would carry in his mind, though unconsciously, the measure of time required for jumping from the car as compared with the time it took the train, after it was discovered, to reach the place of collision. We doubt whether, in strictness, such evidence should be considered matter of opinion. It would seem to be rather matter of fact, to be determined by judgment or estimate. If the mental process be analyzed, it would seem to involve just as much a matter of opinion had the question been how long it would have taken to jump from the hand-car, and how long it took for the train, after its discovery, to reach the place of the accident.

The remaining ground of objection is, that the question called substantially for the opinion of the witness as to the negligence of the deceased.

This objection is not well taken, for the question does not call for such an opinion. It calls simply for a fact which constitutes only one element of the question of negligence, although confessedly a very important one; but other facts must be considered in connection, namely, whether the deceased could see and hear as quickly as others, and whether or not he was lame; also, his position in the car might have been such that he could not jump as soon as others, or, on the contrary, it might have been the best position for the purpose. But if it had been, as the court assumed, the one controlling element in the question of negligence, even then the question would have been proper, for where the point is a proper subject of opinion, and the question is properly framed, it is admissible, though it may be decisive of the question to be decided by the court or jury: *Transportation Line v. Hope*, 95 U. S. 297; *Delaware etc. Steam Tow-boat Co. v. Starrs*, 69 Pa. St. 36; *Walsh v. Washington Ins. Co.*, 32 N. Y. 443; *Moore v. Westervelt*, 9 Bosw. 558; *Jameson v. Drinkald*, 12 Moore, 157.

Another question of evidence, of minor importance, was raised on the trial. The defendant called one Waterbury, the superintendent of its road, "to prove that the rules and regulations in question were reasonable, sufficient, and the best that could be framed to meet the exigencies of the case"; and he stated, in substance, that such was his opinion. Upon his cross-examination he was asked: "Does the foreman of the track section-gang now have to report personally to the switch-house to see if there are any trains out?" This question, against the objection of the defendant, was admitted by the court simply as cross-examination to affect the value of his opinion as expressed in the direct examination. The witness answered: "I might have said something of the kind to the section-boss, and I believe he did give such an order after the accident." As the evidence was not received to show negligence, but was restricted by the court to the single purpose of showing that, as the act of the witness was inconsistent with his expressed opinion, it tended to impair its value, we do not think it conflicts with the principle adopted in *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 47.

Of course, if the new rule or order was not the act of the witness, but of the railroad company, it could not affect him with the inconsistency, but no such point was suggested, and the witness spoke of the order as one which he gave. As the question is presented on the finding, we cannot say there was error.

The other questions in the case, which are very numerous, call upon this court to review the rulings of the court below relative to the negligence of the defendant, and its duties and obligations to its employees under the facts and circumstances detailed in the finding. As there must be a new trial, which will result in a new finding of facts, we do not deem it necessary to discuss or decide the other questions presented in the record.

There was error in the ruling complained of, and a new trial is ordered.

IN ACTION FOR DAMAGES FOR PERSONAL INJURY caused by a steam-shovel, the party operating the shovel at the time may testify as to its effect after being started in operation: *Alabama etc. R. R. Co. v. Yarbrough*, 83 Ala. 238; 3 Am. St. Rep. 715, and note; see also *Beatty v. Gilmore*, 16 Pa. St. 463; 55 Am. Dec. 514.

IMPEACHING WITNESS'S CREDIBILITY BY PROOF of contradictory statements on cross-examination: *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699; note to *Allen v. State*, 73 Id. 762 et seq.; *Milligan v. Butcher*, 23 Neb. 683; but a witness cannot be contradicted by his own declarations, made out of court, unless he has been particularly questioned in regard to them: *Baker v. State*, 69 Wis. 32; nor can a witness be impeached on matters not relevant to the issue: *Id.*; *People v. Dye*, 75 Cal. 108; *G. C. & S. F. R'y Co. v. Coon*, 69 Tex. 730. Party cannot impeach his own witness by proof of contradictory statements made by him, unless the witness is one whom the law compels the party to call: *Hildreth v. Aldrich*, 15 R. I. 163.

FITZPATRICK v. HARTFORD LIFE AND ANNUITY INSURANCE COMPANY.

[56 CONNECTICUT, 116.]

INSURANCE—WAIVER OF MISREPRESENTATIONS IN POLICY.—If a married woman, though living apart from her husband, represents in her application for life insurance that she is a widow, this is sufficient misrepresentation to avoid the policy; but if the clerk of the insurance company is afterwards informed that she is a married woman, and the company levies and collects two assessments on the policy, this constitutes a waiver of its right to avoid the policy.

INSURANCE—NOTICE TO CLERK IS NOTICE TO COMPANY.—If a married woman, though living apart from her husband, represented in her application for life insurance that she was a widow, and assigned her policy for a valuable consideration, after which the assignee informed the company that the insured had a husband living, and desired to know if he could claim the insurance, whereupon the company's secretary referred the inquirer to one of its clerks who informed him that the fact that the husband was living could make no difference, and the company afterwards levied and collected two assessments on the policy, notice to the clerk was notice to the company, and it, by its acts, in effect entered into a new contract of insurance.

INSURANCE — ASSIGNMENT OF POLICY FOR SUPPORT VALID. — The assignment by a laboring woman, living apart from her husband, of her life insurance policy, made in good faith and not as a wager, upon consideration that the assignee, a distant relative, will supply her with a home and proper care and support for life, is valid.

A. P. Hyde, for the appellant.

C. E. Perkins and S. F. Jones, for the appellee.

PARDEE, J. For the purposes of this case, it may be said that on July 16, 1881, the defendant issued a policy of insurance upon the life of Alice Galliger for the sum of two thousand dollars. In her application, which by agreement was made a part of the contract, she stated that she was a widow, when in fact she had a husband, but during several years had lived apart from him. On January 8, 1884, she assigned her interest in the contract of insurance to Mary E. Fitzpatrick, the plaintiff, a distant relative, in consideration of the promise of the latter, made with the consent of her husband, to give the insured a home and food and care in sickness, and notified the defendant of the assignment and the consideration upon which it was made. In the spring of 1885 the insured became unable to work, and thereafter was mostly with the plaintiff, who supported and cared for her until her death, in February, 1886, paying her medical and other expenses.

Upon this part of the case the charge to the jury was to this effect: that if they found that the assignment was made upon the consideration stated by the plaintiff, namely, that she was to give the assignor a home, and was made in good faith, and not as a mere pretext and cover, it is good, and the plaintiff may recover.

The plaintiff offered evidence tending to prove, and claimed to have proven, that on July 20, 1885, she went to the defendant's office for the purpose of asking whether in case of the death of the insured the husband could claim any part of the sum which would then become payable. She spoke to Mr. Ball, its secretary and manager, and told him that she wished to inquire about Alice Galliger's insurance; he referred her to Mr. Preston, a clerk. The latter took from their place Alice Galliger's application for the insurance, and her notice to the defendant of the assignment of the policy to the plaintiff. He looked at the application and asked where Alice Galliger was born; the plaintiff replied, in Ireland, and added that Alice's husband was then living, but had during many years lived apart from her; and asked him if the fact that the husband

was living would make any difference with the company; whether he could claim any part of the sum insured, in case of the death of his wife. Mr. Preston told her that it was a matter of indifference to the company whether the husband was or was not living, and that if living, he could not make any trouble about it. At this time the plaintiff was ignorant of the fact that Alice Galliger had stated in her application that she was a widow. Subsequent to this conversation the defendant made two assessments upon the policy, and received payment thereof from the plaintiff.

Upon this part of the case the court charged the jury to this effect: that if they should find the facts to be as claimed by the plaintiff as to the information given by her to the defendant, and as to the subsequent reception by it of assessments made upon the policy, it had estopped itself from taking advantage of the misstatement of Alice Galliger that she was a widow, made in her application; that it had waived its right to insist upon a forfeiture therefor, and cannot now set it up. The plaintiff had a verdict.

The following reasons are assigned by the appellant as grounds of appeal:—

1. That the court erred in charging the jury, upon the question of estoppel against setting up the defense that Alice Galliger in her application represented herself as a widow when she had a husband then living, as follows: "If you believe the story of the plaintiff as claimed here by her, if you believe that what she says took place in that office at the time did in fact take place as she claims it, and that this company, with this information, subsequently made these two assessments, which she paid, they are estopped from making this claim now; they have waived their right to insist upon this forfeiture, and cannot now set it up."

2. That upon the question whether the plaintiff had any insurable interest in the life of the insured, the court erred in charging the jury as follows: "If you find that this assignment was made upon the consideration stated by the plaintiff, that she was to give this woman a home, and that it was made in good faith, and not as a mere pretext and cover, the assignment is good, and she may recover upon it. Whether it was made in good faith or not, and whether it was not a mere pretext and cover to a wagering policy, a speculation that the law condemns, is for you to say; that is, the good faith of it. So far as the last question is concerned, there is

no legal objection to this arrangement on the ground that this woman has no insurable interest in the life of Mrs. Galliger. If, therefore, you find that this arrangement was entered into upon the consideration stated by the plaintiff, and was entered into by her and Mrs. Galliger in entire good faith, as she claims, then your verdict, if you are satisfied on the other points of the case, ought to be for the plaintiff."

For the purposes of this case, Mr. Ball, the secretary and manager, was the corporation. The plaintiff in speaking to him spoke to it. His act of referring her to Mr. Preston was an act of substitution of the latter for himself which he might lawfully do. It was a declaration to her that she might make her intended communication to the latter, and when so made it would avail her as fully as if made to himself. Therefore whatever the plaintiff said to Mr. Preston, as a matter of law, was said to Mr. Ball and to the corporation.

If she communicated any fact to Mr. Preston of importance, affecting either her own or the rights of the company, and he omitted to communicate it to Mr. Ball, all effects of such omission are to be borne by the corporation. The plaintiff desired and undertook to communicate such a fact directly to the corporation; it preferred to receive and compelled her to make such communication indirectly; it thereby assumed and must bear all risk of failure in the method adopted.

The question arising upon these facts is well stated in the defendant's brief, as follows: "No estoppel is claimed to arise from any express contract or waiver, but it rests on the assumption that after the officers of the company had been informed of the falsity of the statement in the application, they with that knowledge elected to waive the defect and to treat the policies as valid by laying and collecting assessments upon the policy." The defendant, previous to entering into the contract of insurance, required the applicant to make written answers to certain questions. By agreement, this writing became a part of the contract, and was retained of course in its possession. Whenever the company exercises any power reserved to it under that contract, which exercise may in any manner affect the position or rights of the insured, at every such moment the law compels it to have in mind all provisions of the contract, and interprets every act as being done with reference to them. If, in acting, the corporation substitutes the measure of recollection which it may happen to possess for the full measure which the law requires of it, and

harm ensues, it must bear the burden; not the insured. And when it and the insured are at any time jointly considering the rights of the parties under the contract, and the latter communicates to it a fact of importance, a fact which would authorize it to exercise its right to terminate the contract, a fact, indeed, which would compel it to decide whether it would exercise or waive that right, then, as a matter of law, that fact is always thereafter in the mind of the corporation, always present in the contract, always to be taken into account, and always to have the fullest legal force, when it is exercising a power reserved in the contract in a matter which may affect the right of the insured. The law imputes knowledge of the terms of the contract to the plaintiff. It will not hear her say that she has not read them; nor, having read, that she had forgotten. What it will not permit to the party who has entered into one contract only, it will not permit to one who has entered into many. The latter must enlarge his power of recollection in proportion as he multiplies his contracts.

Moreover, it would be impossible to state a number within which the defendant must remember and beyond which it may forget. No principle can be supported by a foundation which is uncertainty itself. In *Morrison v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 59 Wis. 162, an action upon a life policy, the defense was the misstatement by the insured in his application as to his age. He answered by proving that at a time considerably subsequent to the taking out of the policy in suit he took a second one from the defendant in which his age was stated correctly. It replied that it did not know of the misstatement; but the court required it to remember both statements, and therefore to have the error in mind when making subsequent assessments upon the first.

In *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244, the defendant had received information by parol, before it issued a policy applied for, that the applicant intended to go to California from the Atlantic coast overland, and after issuing the policy, had like information that he had done so. It received premiums. Held to be estopped from taking advantage of the written warranty by the assured that he would not go across the country. The company was held to the parol information.

In *Goodwin v. Dean*, 50 Conn. 517, the plaintiff took a mortgage of real estate in 1867; the defendant, as scrivener, drew, witnessed, and took the acknowledgment of it. The grantee

withheld the deed from record until 1877. In 1876 the defendant took and recorded a mortgage of the same real estate. The plaintiff claimed that his mortgage, although unrecorded, was in equity entitled to precedence of that of the recorded mortgage to the defendant, because the latter had knowledge of the plaintiff's mortgage. Held that the law would not presume that the defendant, at the time he took his own mortgage, continued to have the knowledge of the prior mortgage which he had nine years before. And the head-note is as follows: "A case of this sort, where the knowledge was merely casual, and with nothing to impress the fact upon the mind, is very different from a case where there is a duty upon the party to remember, or the notice is of a fact affecting his interests." This last supposed case is precisely the one at bar. It is the legal duty of a party to remember the terms of his contracts; and the fact which was stated to the defendant affected one of its contracts upon a vital point, and was stated by the other party to that contract. In the quoted case the defendant had knowledge, as a by-stander, that two strangers had made a contract. He was without interest in it. No rule of law required him to remember the fact nine years. And this court said: "The plaintiff's argument assumes that the defendant's case depends upon the presumption that he had forgotten the circumstance. It is not a mere question of forgetfulness; the question is, whether he had forgotten anything that he ought to have remembered. Unless he was under some obligation to remember, he is not chargeable with negligence in not remembering. The law imposed no duty upon him, and his interests did not require it. If, while contemplating taking a mortgage on this property, he had been informed that the plaintiff's mortgage was still outstanding, it would have been his duty to remember it. Due regard to his own interests and to the rights of others required him to remember it, and the law might properly impute knowledge to him; because the law supposes that a man will act with due regard to his own interests, and requires him to act with due regard to the rights of others."

In *Wing v. Harvey*, 5 De Gex, M. & G. 265, the agent of a life insurance company knew that a person upon whose life it had issued a policy was living beyond prohibited limits. The company was required to have that fact in its remembrance when it subsequently accepted a premium from him.

In *Ellis v. Insurance Co. of North America*, 32 Fed. Rep.

646, the defendant had consented to the assignment of a policy to the purchaser of the property insured. Neither party then had knowledge of the fact that the vendor had violated the terms thereof. Held, that the defendant could not set up this fact by way of defense. It had in effect said to the assignee that the policy would be good in his hands; and if said either in ignorance or forgetfulness, the consequences are upon itself, not upon the party who had the right to rely upon its declaration. Here is an estoppel because of something done in ignorance. In the case at bar, the defendant not only assented to the assignment of the policy, but it subsequently demanded and accepted premiums upon it, a most emphatic declaration that the policy was good in the hands of the assignee; it demanded premiums, not in ignorance, but simply in forgetfulness.

If the fact thus stated bears upon two or more provisions of the contract, if the plaintiff, in stating it, had knowledge of one only, yet having been stated, the law applies it with equal force to each, because knowledge of both is in the mind of the corporation always. The question turns upon its knowledge, not upon the plaintiff's ignorance.

Therefore the law, operating upon the facts, puts the corporation in this position: the original applicant made a false representation in procuring the insurance; the contract was voidable at its pleasure upon knowledge of the falsehood; but upon such knowledge, it might elect to keep it in force, and reap the attendant advantages. But in doing this, and in notifying the insured of such election by subsequently demanding premiums, it forfeits the right of avoidance, and is held to have entered into a new contract upon a truthful application.

The law for the protection of human life will not permit the purchase of a wagering policy, will not permit a person to buy insurance upon the life of another, unless he has reasonable ground for believing it to be for his pecuniary interest in some degree that the insured life shall continue, or that there should be tie of blood or marriage, actual or expected. In some jurisdictions, the law forbids the transfer of a policy except to a person who has such an interest in the life insured as would have authorized the procurement of the policy.

But we think the weight of argument is in favor of permitting the owner of a contract of life insurance, which has the sanction of the law, to sell it upon the most advantageous

terms, having the world for a market; provided it is an honest exchange of property, and not a mere cover for a wagering transaction. In countless instances, and under many forms, the law has sanctioned contracts which, of necessity, must have resulted in pecuniary profit to one person if another had soon died. The danger to human life from this source has not yet become sufficiently appreciable to provoke the condemnation of these. There is no good reason why the law should condemn an entire class of contracts, great in number, no more dangerous to life, and of equal capacity for good. The rule of law governing all other contracts would seem to be the proper one for these,—to uphold those which are honest and beneficial, and annul all which are proven to be covers for fraud.

The solicitude of the law is for the life of the insured. Upon the record, Alice Galliger was a laboring woman, living apart from her husband, and childless. If with her chose in action she could purchase from a distant relative a home and food for life, with care in sickness, we are unable to see why the law should forbid it. She was willing to trust her life in the keeping of that relative. We cannot see why the law should be more solicitous for her than she for herself.

In *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U. S. 457, the head-note is: "Any person has a right to procure an insurance upon his own life and assign it to another, provided it be not done by way of cover for a wager policy." And in *Ætna Life Ins. Co. v. France*, 94 Id. 561, the court says: "As held by us in the case of *Connecticut Mutual Life Ins. Co. v. Schaefer*, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of a cover for a wager policy." In the subsequent case of *Warnock v. Davis*, 104 U. S. 775, the expressions to the effect that the law permits a transfer only to a person who has an insurable interest in the life insured were doubtlessly occasioned by the belief that the contract under consideration was a wager; for, in the case of *New York Mutual Life Ins. Co. v. Armstrong*, 117 Id. 591, Mr. Justice Field, returning to the subject, says: "A policy of life insurance, without restrictive words, is assignable by the insured for a valuable consideration equally with any other chose in action, when the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies"; citing *Warnock v. Davis*, *supra*.

This rule prevails in Massachusetts, New York, and Rhode Island; also in England: *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; 52 Am. Rep. 245; *Valton v. National Fund Life Ins. Co.*, 20 N. Y. 32; *Rawls v. American Mut. Life Ins. Co.*, 27 Id. 282; 84 Am. Dec. 280; *Clark v. Allen*, 11 R. I. 439; 23 Am. Rep. 496; *Ashley v. Ashley*, 3 Sim. 149. In *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294, this court said: "A question was made before us that Miss Lemon had not an insurable interest in Mr. Peterson's life. If she had undertaken to obtain, and had obtained, an insurance on his life, that question might have arisen. But surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it, and we know of no law to prevent him from making the policy payable, in case of his death, to the person to whom he was affianced; and if such policy is delivered as a gift to the party to whom it is payable, we know no law to prevent such a gift from becoming effectual."

In *Cunningham v. Smith's Adm'r*, 70 Pa. St. 450, a person paid for insurance upon his own life from money furnished him by another, and assigned the policy to that other in pursuance of an agreement made before it was taken. In sustaining the assignment, the court said, in effect, that the assignee might have had such an interest in the life insured as would have enabled him to insure it in its own name, although this was doubtful; but the insured had an interest in his own life, and if he was willing to insure himself with the money of another and to assign his policy to him, there is no principle of law which can prevent such transaction.

There is no error in the judgment complained of.

LOOMIS and BEARDSLEY, J.J., concurred in that portion of the opinion exemplifying the principle that the demand and acceptance of the assessments on the policy by the company after knowledge of the falsity of the statements of the assured in her application constituted a waiver of the forfeiture of the policy by reason of such misstatements, but dissented from that portion of the opinion holding that, from the facts, the company was chargeable with such knowledge; and Loomis, J., delivering the opinion, gives it as his judgment that there was error in holding that the demand and acceptance of such assessments was a waiver of the right by the company to insist upon a forfeiture for the falsity of the statement of the insured that she was a widow, when she had a husband living. In this connection, he says: "A waiver is a relinquishment of a known right. This definition is a well-settled one. The intention courts often find from conduct that is inconsistent with an intent to insist upon the right. But the right relinquished must be one that is actually known to the party making the waiver. No duty rested on these defendants to make the waiver. It was to be, if made,

a wholly voluntary act on their part. Equity does not come in, either to impose a duty or to keep watch over their conduct. It is their actual intent upon actual knowledge that must be established to make the case one of waiver." After stating the facts in relation to the inquiries made by the assignee of the policy at the office of the company, and the responses thereto, all of which appear in full in the case as here reported, he says that it is clear that all the assignee had in mind at that time was the possible trouble to be made by the husband if the insured should die, by claiming the money due under the policy; that it was also clear from her language and testimony that she did not know until after the insured had died that she represented herself a widow in her application for insurance; that what was in her mind was all that was in the mind of the clerk who replied to her inquiries; that there was nothing to call his attention to the facts in relation to the application; and that it was most improbable that he thought of that matter, and that he testified that he recollected no conversation about it. The fact that he took down the papers relating to the policy could not affect the case, as his attention was not called in any particular to the application; that all this is evident from the charge of the court, as follows: "Plaintiff claims in substance that she went there at this time to ascertain the effect the fact that the husband of this woman was living would have upon her getting this insurance in full, or whether the husband could make any trouble about it; that Mr. Preston brought out some papers, and she thinks this application was among them, and that on her putting the question to him, he answered that he thought it would make no difference whether the husband was living or not; that he could claim nothing under the policy, and could make them no trouble." His honor then states that the burden of proof is upon the party seeking to establish waiver, while plaintiff, who was sole witness in her own behalf, did not pretend that she thought of inquiring as to the effect of the misrepresentation made by the insured upon the policy, nor that the subject was referred to as having any relation to the application; that his brethren, recognizing the difficulty, do not rely upon the company's actual knowledge of the true condition of the application, but upon an inference which the law makes or requires, that the company has always within its knowledge all that is contained in its numberless policies. He says: "We cannot accede to this view. The knowledge must be actual, not merely theoretical. It must be practical knowledge, and must enter as such into all the conduct of the company that is to be affected by it. Yet when we look at it as a practical matter, how can the officials of the company carry the innumerable and endless details in their minds. Could the owner of a thousand mortgages in New York carry them all in his mind, so that if he was called on to witness a deed he could at once notice that it was of property upon which he held a mortgage? And if he could not remember his thousand mortgages, can we expect an insurance company to remember the details of its fifty thousand policies? It will not do to say that the company has a duty here. It clearly has none. It can always refer to the papers on its shelves where knowledge becomes necessary, and it would be a superhuman exertion, utterly uncalled for, to attempt to hold these multitudinous matters in mind. The law, in my opinion, does not require and cannot expect such an achievement. If the conduct of the defendants, in receiving the later assessments, is to be regarded as a waiver of their right to take advantage of the misstatement of the application, it is a waiver upon imputed, and not on actual, knowledge, and it seems to me makes necessary the substitution of a new definition of waiver for the old and familiar one. Th.

matter misstated in the application is one of little or no importance, and it is not creditable to the defendants to set it up. But the parties themselves made it a warranty, and its importance becomes therefore a matter that cannot legally affect the result. I think there was error in the judgment, and that it should be reversed, and a new trial granted.

INSURER WAIVES FORFEITURE OF POLICY, if after knowledge of misrepresentations in the application he assesses and collects assessments on the policy: *Frost v. Saratoga etc. Ins. Co.*, 5 Denio, 154; 49 Am. Dec. 234, note 238; and see *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83, and note; *Sty-low v. Wisconsin Odd Fellows etc.*, 69 Wis. 224; 2 Am. St. Rep. 738; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354; *Bailey v. Mutual Ben. Assoc.*, 71 Iowa, 689; *Tobin v. Western Mut. Aid Society*, 72 Id. 261.

NOTICE TO AND KNOWLEDGE of agent, when binding on insurance company: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83, and note 112; *Bartholomew v. Merchants' Ins. Co.*, 96 Id. 72; *Wilson v. Minnesota Farmers' M. F. Ins. Co.*, 36 Minn. 112; 1 Am. St. Rep. 659, and note; *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and note 45; *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310; *N. B. & M. Ins. Co. v. Steiger*, 124 Ill. 81; *McArthur v. Home Life Ins. Co.*, 73 Iowa, 336, and note; *Morrison v. Insurance Co.*, 69 Tex. 353; 5 Am. St. Rep. 63, and note 70.

CROUSE v. PHOENIX INSURANCE COMPANY.

[56 CONNECTICUT, 176.]

CONFLICT OF LAWS—INSURANCE.—A corporation, in addition to its corporate home in the state of its creation, has a legal location, place of business, and corporate home in any jurisdiction in which it has property exposed to execution sufficient to satisfy any judgment which may be rendered against it, and in which, either by force of statutory law there binding upon it, or by its own act or agreement, or by the combined force of both, it so far becomes, in the person of its agent duly authorized for that purpose, a resident therein, as that a general personal judgment can be obtained, which will be binding upon it and any property which it may have in any jurisdiction, as completely as if it had been sued and personally served in the state of its creation where it has its principal legal location and place of business.

FOREIGN ASSIGNMENT—CONFLICT OF LAWS.—An insurance company incorporated under the laws of Connecticut, but doing business in New York, after having complied with the law of that state, sustained a loss on a policy issued to a resident of that state on property therein, after which the assured made an assignment in trust giving a preference to creditors and valid by the laws of that state, the policy being among the assets assigned, subsequent to which certain judgment creditors of the assured, residents of that state, with knowledge of the assignment, garnished the company in Connecticut, as the debtor of the assured, pending which suit the trustee began an action in New York to recover the loss on the policy, and obtained judgment, which was paid by the company. After this such judgment creditors obtained judgment in their suit in Connecticut, and sought by *scire facias* to compel the company to again pay the loss to them. The court held the assignment

valid in New York, the domicile of the assured and the *situs* of the property, though it was not valid in Connecticut; that it passed the title to the policy, and the right to sue thereon to the trustee; that the company was protected by the New York judgment, and was not compelled to pay the loss again in Connecticut.

F. Chamberlin and H. R. Mills, for the appellants.

G. G. Sill, for the appellees.

PARDEE, J. The defendant is a corporation chartered by the legislature of this state, and has its legal location here. In 1885 it issued a policy of insurance against loss by fire in favor of one George M. Hutchinson, a resident in the state of New York, upon property there.

In January, 1886, a portion of it was destroyed by fire. The defendant had previously, in compliance with a statutory requirement by that state, appointed the superintendent of the insurance department therein its attorney there, with such power as that a suit instituted against it there, by service upon its attorney, would support a general judgment, binding upon it and any property belonging to it, in any jurisdiction, as fully as if such suit had been instituted in a court in this state upon service of process upon it here. It had in 1884, and continuously thereafter to the present moment has had, in that state property more than sufficient to pay the loss under the policy, exposed to the levy of an execution.

The plaintiffs, who reside in the state of New York, became judgment creditors of Hutchinson in March, 1886. On May 1, 1886, Hutchinson made an assignment of his property to E. A. Rowland, in trust for the payment of certain of his creditors in full, and of others in part, in equal proportions. This assignment is valid by the law of that state. Hutchinson delivered to the assignee this policy of insurance* as an asset. On May 15, 1886, the plaintiffs, as judgment creditors of Hutchinson, with knowledge of the assignment, instituted a suit against him in this state, and factorized the defendant as being indebted to him for the loss under the policy, and as having in its hands money belonging to him.

On August 30, 1886, the trustee instituted a suit against the defendant in the supreme court in Oneida County, in the state of New York, for the recovery of the loss under the policy. The defendant, in that court, by way of answer, pleaded the facts of the previous institution of the suit against it by the present plaintiffs in the state of Connecticut, and the sequestration of the same money there to their use as creditors of

Hutchinson, and asked the court to stay proceedings until the final determination of the suit in Connecticut. But the court denied the motion, and judgment was there rendered against it on January 17, 1887, which it then and there paid in full.

In November, 1887, the plaintiffs recovered a judgment against Hutchinson in the court in this state, and thereupon have brought this *scire facias* for the purpose of compelling the defendant to pay to them the amount of the loss under the policy, because of their process of sequestration in May, 1886.

Upon the trial the defendant claimed,—1. That on May 15, 1886, by virtue of said assignment, the rights of Hutchinson against the Phoenix Insurance Company under the policy had become vested in the assignee; 2. That the *situs* of the debt due from the insurance company under the policy was in the state of New York, the domicile of the creditor; and the transfer by the assignment, valid by the laws of that state, was valid in Connecticut; 3. That the plaintiffs and Hutchinson, being all residents of the state of New York where the assignment was made, the plaintiffs having full knowledge thereof could not by coming into this state avoid the title of the assignee acquired by a transfer valid by the laws of their own domicile; 4. That on May 15, 1886, when the garnishment process was served upon the insurance company, it was not indebted to Hutchinson.

But the court overruled these claims, and rendered judgment for the plaintiffs. The defendant appeals, assigning the following reasons: 1. That the court erred in overruling the claim of the defendant that on May 15, 1886, by virtue of the assignment, the rights of Hutchinson against the insurance company under the policy of insurance had become vested in the assignee; 2. That the court erred in overruling the claim of the defendant, that the *situs* of the debt due from the insurance company under the policy was in the state of New York, the domicile of the creditor, and that the transfer by the assignment, valid by the laws of that state, was valid in Connecticut; 3. That the court erred in overruling the claim of the defendant, that the plaintiffs and Hutchinson being all residents of the state of New York where the assignment was made, the plaintiffs having full knowledge thereof could not by coming into this state avoid the title of the assignee acquired by a transfer valid by the laws of their own domicile; 4. That the court erred in overruling the claim of the defend-

ant, that on May 15, 1886, when the garnishment process was served upon the insurance company, it was not indebted to Hutchinson.

For the purposes of the question before us, it may be said, as a matter of law, of a corporation such as is the defendant, that, in addition to its corporate home in the state of its creation, it has a legal location, place of business, and corporate home in any jurisdiction in which it has property exposed to the levy of an execution sufficient to satisfy any judgment which may be rendered against it, and in which, either by force of statutory law there binding upon it, or by its own act and agreement, or by the combined force of both, it so far becomes in the person of its agent, duly authorized for that purpose, a resident therein, as that a general personal judgment can be obtained which will be binding upon it and on any property which it may have in any jurisdiction, as completely as if it had been sued and personally served with process in the state in which it was created and has its principal legal location and place of business.

The legislature of the state of New York, as a prerequisite to permission to the defendant to take a premium from any resident of that state for insurance upon property therein against loss by fire, required it to so far become, in the person of its agent duly authorized for that purpose and residing in that state, a resident there as that service of process made returnable to a court therein could there be so made upon it as to support a general personal judgment, binding in any jurisdiction; also to have therein, at all times, exposed to the levy of an execution, sufficient property to satisfy any judgment which might there be rendered.

The defendant complied with both requirements,—appointed and empowered the agent, and continuously thereafter held the required amount of property there exposed to an execution. The legal result of this combination of requirement and submission is, that on the day of the execution of the policy, the defendant had, and from thence hitherto has continued to have, a legal location in the state of New York, by the act of its legislature, for the purpose of determining, in the event of a contest between its own citizens, which of them is entitled to receive the amount payable under one of its policies, and of enforcing payment from its property therein. Hutchinson, the other party to the contract, is also a resident there; the property insured was there; the loss occurred there.

The *situs* of the debt under the policy is as if both parties to it were natural persons resident in that state, and had entered into a contract expressly providing for execution there. The defendant, having borne the burden of obedience to the law of New York, is entitled, as against citizens of that state, to all resulting advantages. One of them is, that having paid a debt once upon compulsion of the court in New York having jurisdiction, it shall be protected from a duplicate payment to citizens of that state, whom the assignee there represented, and for whom the court there spoke in rendering judgment. Therefore, at the time of the assignment, the claim under the policy was an asset of the estate of the assignor, and was fully and exclusively under the control of the courts in the state of New York.

The assignment was in accordance with the law of that state; the plaintiffs were resident there, parties to those laws, and owing obedience to them, and are conclusively bound thereby. It is not for them to come into this jurisdiction and complain of the operation of the law of their own state upon a contract which, together with all parties to it, and themselves as well, was subject to that law. It is not for them to say here what they would not be allowed to say in their own jurisdiction,—in the jurisdiction comprehending all parties and the property and the contract, namely, that the law of New York is offensive to them because it permits preferences in assignments. They knew the law when they gave credit to their debtor; they voluntarily assumed the risk, calculated the danger in fixing the terms of the transaction, and are not now to be heard to complain of it. It is true, the law of New York differs from our own. But the difference does not directly concern the interests of our citizens. It is not in such a degree offensive to our moral sense as to compel us to disregard it, to the direct injury of a resident here.

This is a contest between the plaintiffs and other residents in the state of New York as to the ownership of a fund in the keeping of the defendant, a stake-holder, which, together with the fund, is subject to the jurisdiction of the courts there. It is certain that if the plaintiffs had submitted themselves to a judgment by the courts there, it would have been against them. They have transferred the controversy to this jurisdiction, within which the defendant has residence also, and estate, as speculators upon the possibility of obtaining the judgment here upon comity, which would be denied them there upon

law. Practically, they have there had all rights and opportunities which are embraced in the expression "a day in court"; they have no legal need of a second day here.

In *Upton v. Hubbard*, 28 Conn. 274, 73 Am. Dec. 670, and in *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442, access to the debtor was possible only through the door of a court in this jurisdiction. Therefore it was opened to the foreign creditor who first knocked, as it would have been to the most diligent resident. The debtor was a mere stake-holder; he was in no peril of double payment; it mattered not to him as to whom he paid once. There was opportunity, and reason as well, for comity. In the case at bar there is neither.

There is error in the judgment complained of, and it is reversed.

CORPORATION DOING BUSINESS IN TWO OR MORE STATES, domicile of for the purpose of service of process or securing judgment against: *Young v. South Tredger Ins. Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752, and note 760; *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113; 5 Am. St. Rep. 425.

EXTRATERRITORIAL EFFECT OF ASSIGNMENT FOR BENEFIT OF CREDITORS: *Richardson v. Leavitt*, 1 La. Ann. 430; 45 Am. Dec. 90; *Dord v. Bonnafée*, 6 La. Ann. 563; 54 Am. Dec. 573; note to *Hanford v. Paine*, 78 Id. 594; note to *Long v. Towl*, 97 Id. 355; note to *Brewer v. Marshall*, 97 Id. 678; *Butler v. Wendell*, 57 Mich. 62; 58 Am. Rep. 329.

SPITZ'S APPEAL.

[56 CONNECTICUT, 184.]

HUSBAND AND WIFE — WIFE, WHEN MAY TESTIFY AGAINST HUSBAND. —

Wife having a claim as creditor against the insolvent estate of her husband may testify against him, as to the character of the various transactions out of which her claim arises, and as to conversations which took place between herself and husband in the absence of other witnesses in relation to such claim. Such conversations are not privileged communications.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE. — Connecticut statutes of 1877, General Statutes 1888, section 2796, provide that all property owned by the wife when she marries shall remain her sole and separate estate. Prior to its adoption the wife had in equity all the rights of a *feme sole* in respect to such estate, including the right to make any contracts in relation thereto with her husband, and though the statute provides that she may contract with others, it is silent as to her capacity to contract with her husband; but such silence cannot be construed as implying an impairment of her prior right to enter into such contracts. Therefore, a woman married since the adoption of such act retains such right.

HUSBAND AND WIFE. — RULE THAT WIFE SHALL NOT TESTIFY against husband is founded upon their legal unity and the policy of preventing discord between them, but it is not applicable to actions at law in which the husband and wife have conflicting interests and are opposing parties, as in divorce actions, suits by the wife seeking protection against the husband, or suits in equity relating to the wife's separate estate.

T. H. Russell, for the appellants.

E. P. Arvine, for the appellee.

BEARDSLEY, J. This is an appeal from the allowance by the commissioners on the insolvent estate of William M. Pemberton, assigned in trust for the benefit of his creditors, of the claim of his wife, Emily A. Pemberton. The appellants are creditors of the estate, whose claim was allowed by the commissioners.

The case was referred by the superior court to a committee, from whose report it appears that said William M. and Emily A. were married in January, 1878, she then having a large property, which she had inherited, and he being without property. Between the first day of February, 1878, and the twenty-sixth day of May, 1886, he received from her various sums to the amount of about thirty thousand dollars.

Most of these sums were advanced by her upon his promise to repay the same with interest. The others were the proceeds of her real estate sold by his advice and upon his promise to invest the avails to better advantage, but which avails he applied to his own use. The committee finds that all the testimony offered by the appellee, in reference to the character of the various transactions out of which the claim of the appellee arose, consisted of the statements of Mrs. Pemberton as a witness as to the conversations which took place between herself and her husband in the absence of other witnesses. The appellant objected to the testimony of Mrs. Pemberton to such conversations, upon two grounds: 1. That the wife cannot in this proceeding testify against her husband or his estate in reference to this matter; and 2. That her testimony was a statement of confidential communications made to the wife by the husband. The committee admitted the evidence, and the appellants remonstrated upon this ground against the acceptance of the report of the committee, and the court overruled the remonstrance. We think that the evidence was clearly admissible.

Commissioners on insolvent estates, and the superior court on appeal from their decisions, act both as courts of law and

courts of equity: *Collins v. Tillou's Adm'r*, 26 Conn. 361; 68 Am. Dec. 398. Mr. and Mrs. Pemberton were married after the statute of 1877 went into effect. That statute provides that "in all marriages hereafter contracted, neither the husband nor wife shall acquire by force of the marriage any right to or interest in any property held by the other before marriage. . . . The wife shall have power to make contracts with third persons, and to convey to them her real or personal estate, in the same manner as if she were unmarried": Gen. Stat. 1888, sec. 2796.

By this statute, in cases provided for by it, all the property of the wife owned by her when married became her sole and separate estate. Prior to its adoption the wife had, in equity, all the rights of a *feme sole* in respect to such estate, including the right to make any contracts in relation to it with her husband.

In *Comstock's Appeal*, 55 Conn. 214, this court says: "That separate estate she [the wife] can dispose of as she pleases. She may put it into his [the husband's] hands to manage as her agent, she may loan it to him, and she may make an absolute gift of it to him." The statute, which is particularly conversant with the legal rights and obligations of the parties, while it provides that the wife may contract with others, is silent as to her capacity to contract with her husband; but no intention to impair her prior right to enter into such contracts is implied by such silence. The statute was not designed to abridge any rights of property which the wife had before its enactment; but on the contrary, its object was to invest her with the complete ownership and control of the property which she had when married, or might thereafter acquire. It may well be that the legislature deemed it wise to leave contracts between husband and wife to the jurisdiction of courts of equity.

The rule of the common law that the wife shall not testify against the husband is founded upon their legal unity and the policy of preventing discord between them. It is not applicable to actions at law in which the husband and wife have conflicting interests and are opposing parties, as petitions for divorce or suits by the wife seeking protection against the husband, and has no application to suits in equity relating to the wife's separate estate.

In a court of equity, the *status* of the wife in respect to such estate is not affected by her marriage; but she has all the

rights of a *feme sole*: *Butler v. Buckingham*, 5 Day, 501; 5 Am. Dec. 174; *Imlay v. Huntington*, 20 Conn. 173; *Leavitt v. Beirne*, 21 Id. 8.

A claim that, while the wife may sue her husband, and obtain judgment and execution against him, she could not testify in support of the allegations of her complaint, because the peace of the family might thereby be disturbed, would border upon absurdity.

We may add that the claim that the privilege of the husband was violated by the testimony of Mrs. Pemberton, because it was a disclosure of private and confidential communications made by him to her, has no foundation in fact. The only communications by her husband, testified to by Mrs. Pemberton, were his promises and representations made to induce her, and which did in fact induce her, to advance to him the money in question. They were presumably made to evidence his indebtedness to her, and constituted his contract for its payment. They were no more privileged than a promissory note would have been if he had made his contract in that form.

The appellant also remonstrated against the acceptance of the report upon the ground that the committee permitted a leading question to be put to a witness, and upon the further ground that he refused to grant an adjournment of the trial when requested to do so by the appellant's counsel. These claims have not been pressed in argument, and so obviously refer to a mere exercise of discretion by the committee as not to require discussion.

There is no error in the judgment appealed from.

COMPETENCY OF HUSBAND OR WIFE AS WITNESS AGAINST THE OTHER:
Chamberlain v. People, 23 N. Y. 85; 80 Am. Dec. 255, and note.

BROWN AND BROTHERS v. BROWN.

[56 CONNECTICUT, 249.]

EXECUTORS AND ADMINISTRATORS — PRESENTATION OF CLAIM AGAINST ESTATE. — Where the president of a corporation is executor and principal legatee under his father's will, and also custodian of a note given by the latter in favor of such corporation, the knowledge and possession of the note as president of the corporation is knowledge and possession of it as executor, so that no formal presentation is necessary in order to make the note a valid claim against the estate; and it makes no difference that such executor kept the fact that he was custodian of the note secret from the corporation until after the time for presenting claims against the estate had expired.

EXECUTORS AND ADMINISTRATORS — AGREEMENT BY EXECUTORS BINDING AGAINST ESTATE. — Where, in an action on a note against an estate, the executors agree in writing that plaintiff take judgment for the amount of the note, with certain limitations on the use of such judgment, this is binding against the estate, as an admission, and admissible in evidence, that the note had been properly presented against the estate, and also of its liability upon the note in suit.

J. W. Webster and S. W. Kellogg, for the appellants.

G. E. Ferry and J. W. Alling, for the appellees.

PARK, C. J. This case comes before us on an appeal from the judgment of the superior court in denying a motion to set aside a nonsuit. From the testimony produced by the plaintiff on the trial, and which is spread upon the record, it appears that Philo Brown, of whose will the defendants are executors, on the first day of July, 1878, made his note for the sum of one hundred and twenty-five thousand dollars, payable on demand to Brown and Brothers, the plaintiff corporation, with interest, and left it with William H. Brown, now one of his executors, who was then the president of the corporation. No question is made as to the consideration of the note, and the history of the transactions out of which it grew and the circumstances in which it was given are of no importance to the decision of the case. William H. Brown was a principal legatee under the will of Philo Brown, who was his father, and had, therefore, a direct interest in preventing a presentation of the note against the estate. Philo Brown died in May, 1880, a little less than two years after the note was given, and up to that time William H. Brown had kept the fact that he had received the note from the knowledge of the other directors and members of the corporation, and after his father's death he kept the fact secret in the same manner until after the completion of the settlement of

his estate in 1884, and, of course, until a long time after the period limited for presenting claims against the estate had expired, which was in December, 1880. The present suit was brought upon the note against the estate on the tenth day of June, 1884, which was less than four months after the existence of the note had been brought to the knowledge of the directors of the corporation other than William H. Brown.

The first question that presents itself in the case is, whether the claim was legally presented against the estate of Philo Brown. It is clear that the mere fraud of William H. Brown in concealing the existence of the note and in keeping it back from a former and regular presentation against the estate cannot help the plaintiff corporation. Every corporation must bear the fraud of its own agents. But we think it clear that, as William H. Brown was one of the executors of Philo Brown's will, his knowledge and possession of the note as president of the corporation were his knowledge and possession of it as executor. As he was acting in both capacities, he had that knowledge and possession in both capacities.

It has been long settled by our decisions and practice, that a formal presentation of a claim to an executor or administrator is not necessary: *Hammett v. Starkweather*, 47 Conn. 439. The language of our statute has been, through all our revisions, that the creditor "shall exhibit his claim." He must in some way bring it to the knowledge of the executor. It need not be done in writing. It is not enough that the executor has in some casual or outside way learned of the existence of the debt. He may perhaps have found some entry with regard to it among the papers of the deceased, or may have heard it spoken of in the street. It must be brought to his knowledge by some action of the claimant, or in his behalf, that the claim is held against the estate. Here William H. Brown, as president, had full knowledge of the existence of the claim and of his duty to present it against the estate. But there was no reason why he should go through the form of giving himself notice of it; that notice in his other capacity he had already. There was no need of his making an oral declaration in one capacity to himself in the other. The speaker and listener would have been the same person.

In *Thomas v. Chamberlain*, 39 Ohio St. 112, it is held that where the same person was administrator of both the creditor and the debtor estate, no formal presentation of a claim of the former estate against the latter was necessary, but that

his possession of the evidence of the claim as administrator of the former estate was a possession of it as administrator of the latter, and that the law would infer a presentation of it.

We have no hesitation in deciding that the claim was legally exhibited to the executor within the time limited for the presentation of claims.

The question whether the suit was brought within four months after notice of the rejection of the claim by the executors, is one that does not arise in the case as it stands. It is wholly matter of defense, and one that constituted no part of the plaintiffs' case. We do not think it proper, at this stage of the case, to give the question any consideration.

The questions made, with regard to the rulings of the court in excluding evidence offered by the plaintiffs, do not properly arise upon the question of setting aside the nonsuit. If evidence had been admitted that should have been excluded, it would be necessary that the ruling of the court should be vindicated if we were to hold that the plaintiffs had made out a *prima facie* case. But if their case is made out without the excluded evidence, the erroneous ruling has been so far harmless and may be laid out of the case.

There is, however, one question of evidence of some importance that will arise upon the further trial of the case, and which, as the counsel have argued it, we will express an opinion upon.

While the present suit was pending, on the 7th of August, 1884, the following paper was executed by William H. Brown, in his individual capacity, and as executor and trustee, and by Hiram Van Dusen, his co-executor and trustee, and delivered to Brown and Brothers, the plaintiffs:—

“In consideration of a discharge to be executed by Brown and Brothers, of Waterbury, Connecticut, releasing and discharging William Henry Brown and the estate of Philo Brown, deceased, from all claims and demands, except a note of one hundred and twenty-five thousand dollars now in suit against the executors of said estate, we, William Henry Brown, individually and as executor and trustee, and Hiram Van Dusen, executor and trustee of the estate of Philo Brown, do hereby promise and agree to and with said Brown and Brothers that said Brown and Brothers may acquire and secure whatever interest they can in the homestead of said deceased by judgment on said note now in suit; provided that said Brown and Brothers shall not disturb the widow of said

Philo Brown in the occupancy of said homestead during her life upon or by means of said claim of one hundred and twenty-five thousand dollars; and we further agree that said company may enforce any lien which they may have for said indebtedness on all stock of said estate in said company; and I, William Henry Brown, hereby agree to transfer to the order of Brown and Brothers, or to such person as they shall direct, my interest in all stock of the company in which I have an interest; provided that this agreement and any transfers made in pursuance thereof are not in any way to affect or prejudice the rights, if any, of the said widow, or of Mrs. Cornelia A. Buel, or either of them, under their denial of said lien.

“Dated this seventh day of August, 1884.

“WM. HENRY BROWN. [L. s.]

“WM. HENRY BROWN, [L. s.]

“As Executor and Trustee.”

“HIRAM VAN DUSEN, [L. s.]

“As Executor and Trustee.”

This document the plaintiffs offered in evidence, and the court excluded it. The ground of the exclusion does not appear from the report of the evidence. We think it should have been received. The paper is signed by both executors, so that no question arises as to the power of one executor to make an agreement binding on the other. And it not only treats the note in question as in suit without suggesting an objection to it (an admission that it had been properly presented), but consents that the plaintiffs may take a judgment in the suit for the amount of the note, with only this limitation upon the use of the judgment, that the widow shall not be disturbed in her life occupancy of the homestead, and that certain rights, if any, of the widow and Mrs. Buel in the stock of Brown and Brothers held by the estate shall not be prejudiced. This limitation does not enter into the judgment. It is only the personal agreement of Brown and Brothers that they will not use the judgment after it is obtained adversely to these specified interests. It is an admission of the liability of the estate upon the note in suit.

But it is contended that an executor or administrator has no power to bind an estate by his admissions; and in support of this claim, the case of *Rhodes v. Seymour*, 36 Conn. 1, decided in 1869, and some of the earlier decisions of this court, are cited. It is not necessary for us to controvert the rule that seems to be established by these decisions as the law of

this state, though different from the law of some of our sister states, that a mere admission by an executor or administrator of some fact affecting the liability of the estate is not evidence against the estate. We have here something more than an admission. It is an agreement, by the executors as defendants in the present suit, made while the suit was pending, and with regard to the claim in suit. It is difficult to see why such an agreement, upon a valid consideration, should not be binding and sustained by the court; much more why it should not be admissible. The defendants had full power by a demurrer to admit the facts alleged; and in any case, an executor could allow a default to be taken, and have the case heard in damages. An executor or administrator can, in the exercise of his judgment, pay a debt proved against the estate. If he may pay the debt, it is difficult to see why, when suit is brought, he may not agree that judgment may be taken. Such a view is amply sustained by the authorities: *Emerson v. Thompson*, 16 Mass. 429; *Hill v. Buckminster*, 5 Pick. 391; *Faunce v. Gray*, 21 Id. 245; *Phillips v. County of Middlesex*, 127 Mass. 262; *Eckert v. Triplett*, 48 Ind. 174; 17 Am. Rep. 735; *Church v. Howard*, 79 N. Y. 415, 418; *Lawson v. Powell*, 31 Ga. 681; 79 Am. Dec. 296.

We think the document should have been received in evidence.

There is error in the judgment complained of, and it is reversed.

POWER OF EXECUTOR TO BIND ESTATE by his declarations, admissions, or promises: *Lawson v. Powell*, 31 Ga. 681; 79 Am. Dec. 296.

CARD v. FOOT.

[56 CONNECTICUT, 369.]

EVIDENCE—DECLARATIONS.—IN ACTION TO RECOVER PROCEEDS OF SALE of a bond claimed to have been placed in defendant's hands, but which bond defendant claims plaintiff never had, and that the whole story is a fabrication of recent origin, plaintiff may prove, for the purpose of showing that she was the owner of such bonds long before the present action was commenced, that on delivering a package to a friend, she told her to keep it in a safe place; that it contained such bonds; also that, four years before, she stated to a witness that she owned such bonds; and such declarations are admissible, notwithstanding the absence of defendant when they were made.

WITNESS MAY ALWAYS REFRESH HIS MEMORY FROM A MEMORANDUM, when he does in fact testify from his memory thus refreshed; and it is no objection to the memorandum that it was written by the witness's son, in his presence and at his dictation, for it is the memorandum of the witness, and not that of the son.

W. L. Bennett, for the appellant.

C. S. Hamilton, for the appellee.

PARK, C. J. On the trial of this case in the court below the plaintiff offered evidence to prove, and claimed to have proved, that in the spring of 1884 she put \$1,060 into the hands of the defendant for him to purchase for her a first-mortgage bond of \$1,000 of the Metropolitan Elevated Railroad Company; that he purchased the bond and delivered it to her, and that she afterwards returned it to him for safe-keeping; that in April, 1885, she purchased a house in the city of New Haven, and was under the necessity of selling the bond to raise a part of the purchase-money, and that she requested the defendant to sell it for her; that he advised her not to sell, as the bonds of the company were rising in value, but to get a loan and pledge the bond as collateral; that the defendant did this for her, and brought her \$892.75, which she paid on her purchase; that in July, 1885, the defendant sold the bond for \$1,077.50, without the July coupon of \$30, and that he has ever since refused, though often requested, to pay the balance of the money left in his hands.

The defendant denied all the claims of the plaintiff as to the purchase and sale of the bond, and as to the delivery to him of any money for such a purpose, and claimed that her entire story was a fabrication.

The plaintiff, for the purpose of helping out her case, offered evidence to prove that this bond was one of four which she had owned, and which had been purchased for her by the defendant, the other three having been purchased in the year 1879; that at that time she put into the defendant's hands \$3,160 for the purchase of those three bonds, all of which were of the same character and amount as the one first referred to, and that he purchased and delivered them to her; that she put them in a tin case which he furnished her for the purpose, and which she kept in her sleeping apartment; that in December, 1883, a fire took place in the house in the night, and that she fled to the house of Mrs. Lyon, a neighbor; that the fire was soon extinguished, and that she returned and found the bonds had not been injured, and that she took them to the

house of Mrs. Lyon, and delivered the tin case containing them to Lena Lyon, the daughter of Mrs. Lyon. The defendant denied all knowledge of or connection with any such bonds on his part, and it thus became a question bearing materially upon the whole case whether the plaintiff ever had any such bonds and any such dealings with the defendant with regard to them, or whether her whole story was a fabrication.

When the plaintiff had stated that she had thus delivered the package to Miss Lyon for safe-keeping, she was asked by her counsel, "What did you ask her to do with it?" to which she replied, "I asked her to keep it safely." Her counsel then asked her, "What direction did you give her in regard to keeping it?" to which she answered, "I asked her to put it in a safe place for me; for they were my bonds."

To both of these questions and the answers the defendant objected, and especially to her declaration in the last answer that they were her bonds. The court admitted the evidence, and this raises the first question in the case.

We think the court committed no error in this ruling. The evidence was offered to show that the plaintiff's conduct, long before any controversy had arisen with regard to the matter, was in entire keeping with the possession of the bonds to which she had testified. There was nothing in the appearance of the package tending to show that it contained the bonds, or anything of value, while her conduct and speech were a natural indication that it did contain valuable bonds. If, as she claims, it contained the bonds in question, it would have been very remarkable and contrary to human experience if she had not informed Miss Lyon of its value, and of the importance of keeping it safely, while if the package contained nothing of value, no adequate motive can be conceived for her caution with regard to its safe-keeping, or her statement as to its containing her bonds. Indeed, no adequate motive can be conceived for her getting it from the place where she had kept it, and bringing it to Mrs. Lyon's house. If it had appeared that she had delivered it to Miss Lyon without any suggestion of its value or of its containing her bonds, the fact would have been at once seized upon by the opposing counsel as showing that the package contained nothing of value, and that her whole testimony with regard to it was false.

The plaintiff's remark that the package contained her bonds was admissible rather as an act than as a statement, and wholly on the ground, as we have before remarked, that

it was a natural act. If it were to be taken as a statement, its value might depend upon her veracity; but if regarded as an act, the question of veracity does not arise. The question was, whether she had those bonds. Her conduct before any controversy arose becomes an important indication of the real fact. Thus, suppose she had hired a drawer in a safe-deposit vault, and had placed a package in it, there being no pretense that she had any other bonds than these, her conduct, even if no word had been spoken, would be admissible in evidence as strengthening the probability that she had the bonds. Now, if in hiring the drawer she had remarked that she wanted it to keep some railroad bonds in, the remark would be admissible as a part of her conduct in the matter, not as a declaration purporting to be truthful, but as a natural act in the circumstances. It would be of the same precise nature as the act of hiring the drawer without any declaration as to the use to be made of it. Just so, if she had put the bonds in her tax-list, no controversy having then arisen, that fact would operate in her favor, but only as a natural act on her part, not as a declaration independent of the act.

This view of the matter disposes of the objection made by the defendant's counsel that he was not present to hear what was said. There was clearly no more necessity that the defendant should have been present and have heard her remark than it would have been in the case supposed that he should have been present and seen her hire the drawer in the safe-deposit vault. Neither act had any relation to him. The principle upon which declarations made by a party to a controversy are admissible when made in the presence of the other party, and inadmissible otherwise, is, that when heard by him he has the opportunity to contradict them, and his failure to do so is equivalent to an admission of the truth of the statement of his adversary. But here there was nothing which he had at the time any interest in denying, while, regarding the whole as simply constituting an act on the part of the plaintiff, it was not a matter calling for admission or denial.

There is another ground upon which this evidence became pertinent and admissible. The defendant claimed that the suit was fraudulently brought to extort money from him, and that the plaintiff's story was not only an entire fabrication, but was one of recent origin. Of course it was admissible on her part to show that it was not of recent origin, and nothing was more pertinent than this evidence upon that matter.

But the plaintiff further, for the purpose of showing that her claim to the ownership of the bonds was not of recent origin, offered one Charles H. Card as a witness, who testified that about four years before the trial, and before any controversy with regard to the matter had arisen, she stated to him that she had some Elevated Railroad Company bonds. This evidence the court received, against the objection of the defendant's counsel.

There was no error in this ruling. The question was, When did the plaintiff first claim to own the bonds? The fact could not be proved otherwise than by her declarations. The defendant claimed that she had never pretended to own them till recently. This could be met only by showing that she had claimed to own them at an earlier time, and the fact that she had made the claim four years before became one of increased weight in her favor in meeting the claim of the defendant. And it is of no consequence here, as in the case we have before considered, that the defendant was not present when the statement was made.

The counsel for the defendant cross-examined the plaintiff with regard to the sources from which she derived the money which she claimed to have invested in the bonds, and she stated in reply to his questions that she carried on the business of a milliner and dress-maker in the city of New Haven, and that her customers were of the wealthy class, who paid her good prices for her work. On her redirect examination she was asked to state the names of her customers. In doing so she used a memorandum for the purpose of refreshing her recollection, which was written by her son at her dictation. The defendant's counsel objected to any use of the memorandum, but the court admitted it.

There was no error in this ruling. A witness may always refresh his memory by referring to a memorandum, where he does in fact testify from his memory thus refreshed. It is no objection to the memorandum here that the names were written by her son, for he did it in her presence and upon her dictation, so that it was her memorandum, and not his.

There is no error in the judgment appealed from.

DECLARATIONS OF PARTY TO SUIT, WHEN ADMISSIBLE IN EVIDENCE: *Stackman v. State*, 24 Tex. App. 394; 5 Am. St. Rep. 894, and note 896; compare *Clever v. Hilberry*, 116 Pa. St. 431.

WITNESSES HOW FAR MAY REFRESH MEMORY FROM MEMORANDUM NOT MADE BY THEMSELVES: *Hill v. State*, 17 Wis. 675; 86 Am. Dec. 736; note to *State v. Bacon*, 98 Id. 632. But memoranda prepared by attorneys of witness several months after the occurrence of facts testified to are not admissible to refresh witness's memory: *Schuyler Nat. Bank v. Bollong*, 24 Neb. 825.

BRADLEY v. BAILEY.

[56 CONNECTICUT, 374.]

TENANCY FOR LIFE—EMBLEMENTS. — If tenant for life sows the land, but dies before the crop matures, his executor is entitled to the emblements or profits of such crop; and this right cannot be defeated by evidence of the condition of the tenant's health at the time of planting the land, or by his or his lessee's declarations imputing belief, however well founded, or knowledge, if possible, that the tenant's life would not continue until the maturity of the crop.

TENANCY FOR LIFE—EMBLEMENTS. — Right of executor of tenant for life to the crop planted by the latter during his lifetime does not depend upon whether the land was cultivated in a husband-like manner, or the crop planted in the customary way.

L. Harrison and E. Zacher, for the appellant.

E. P. Arvine and G. A. Tyler, for the appellee.

BEARDSLEY, J. This is a complaint in trespass, in which the defendants appeal from an adverse judgment in the court of common pleas.

The material allegations of the complaint are, that one John B. Bailey was tenant for life of a certain tract of land, of which the defendant George R. Bailey was tenant for life in remainder; that John B. Bailey, in the month of April, 1885, leased the tract to the plaintiff for the term of three years; that the plaintiff sowed a portion of the tract with winter rye on the 18th of September, 1885; and that John B. Bailey died on the 20th of September, 1885, and that George R. Bailey, and the other defendant by his direction, in the month of June following, plowed in and destroyed the crop of rye then maturing. The truth of these allegations of the complaint was admitted upon the trial, except that the defendant claimed that the rye was sown on the nineteenth instead of the eighteenth day of September, 1885, which, however, is immaterial.

The only question which we are called upon to consider arose under the issue formed by the plaintiff's traverse of the second answer to the complaint, the material part of which is

as follows: "The defendants say that if the plaintiff did anything upon said premises on September 18 or 19, 1885, he did the same with full knowledge that said John B. Bailey was then dying; that if he did anything, it was nothing more than to harrow the soil in a hasty and superficial manner immediately after he had dug his crop of potatoes from the same, and to scatter a few seeds upon the same, without having first plowed and manured the same, as is customary and proper with the farmers in this state, and at an untimely season of the year, and without laying the same down to grass, as is customary and proper; all of said acts of the plaintiff being for the purpose of defrauding said George R. Bailey in his use of and right to said land after the death of said John B. Bailey."

Upon the trial of this case to the jury, the plaintiff, in reply to inquiries made by the defendants upon cross-examination, described the manner in which he prepared the ground for the crop. The defendant afterward asked his own witness this question: "What is the customary way of sowing rye, and preparing the ground for it?" The court excluded this question, upon the objection of the plaintiff that there was no established custom, and that it was immaterial. The defendants claimed the testimony to show that the land was not prepared in the customary way, as a part of the alleged defense. This ruling of the court is assigned for error.

In support of the allegation in the answer that the plaintiff knew that John B. Bailey, the tenant for life, was dying when he sowed the crop, the defendants called Dr. Webb, the physician who attended him during the month of September, 1885, and who, after describing his symptoms, testified that for the last week or more of his life he was gradually failing every day, growing weaker and nearer to his end every day, and that this was apparent to every one who had common sense.

It was admitted that at the time of his death, and for several months before, he resided with the plaintiff.

The defendants then offered several witnesses to testify,—one, that Bailey appeared to be dying on the 16th and 17th of September, when the plaintiff was present; another, that the plaintiff's attention was called by him to Bailey's condition on the 18th of September, 1885; another, that the plaintiff had said on the 18th and 19th of September that Bailey could not live through the night; and another, that the plaintiff had said a few days before Bailey's death that he was

very low. All of this evidence, except the testimony of Dr. Webb, was objected to by the plaintiff and excluded. The plaintiff, against the objection of the defendants, was permitted to testify, in contradiction of Dr. Webb, that the doctor had told him, as late as the last week of Bailey's life, that "he might live for quite a long time; that he might get out of it and live for a year or two, and perhaps longer, and might not live so long as that."

The court charged the jury on this point as follows: "The question, then, is, Did the plaintiff know for a certainty that his lessor, the tenant for life of the estate, would die before he could mature that crop? If we find that there was any uncertainty in regard to the duration of the life of Mr. Bailey, you must find for the plaintiff. If you find that the time of his death was so certain that he (Bradley) had no doubt in regard to it, then your verdict should be for the defendants."

The several rulings of the court, and the charge to the jury referred to, are assigned for error. We do not think that either of them afford the defendants any ground of exception. On the contrary, we think that the charge was too favorable to the claim of the defendants. It was adapted to the issue between the parties, and would perhaps have been unobjectionable if that issue had been a material one; but the issue was an immaterial one, and the plaintiff would have been entitled to judgment upon the conceded facts if it had been found in favor of the defendants.

If it were possible for the plaintiff to have had absolute knowledge beforehand of the time of Mr. Bailey's death, and he had known that it would occur before the maturity of the crop which he was planting, his right to it would not be thereby defeated.

In Coke on Littleton, page 55 b, note 1, the law is thus stated: "So, therefore, if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God; and the same law is of the lessee for years of the tenant for life." Blackstone says (2 Com. 122): "Therefore if a tenant for his own life sows the land and dies before harvest, his executors shall have the emblements or profits of the crop; for the estate was determined by the act of God, and it is a maxim of the law that, *Actus Dei nemini facit injuriam*." We are referred to no case in which the exception claimed by the defendants has been made to this rule during the centuries of its existence.

To hold that this right may be defeated after the tenant's death, by evidence of his condition of health, or by his declarations or those of his lessee imputing a belief, however well founded, or knowledge, if such knowledge be possible, that his life would not continue until harvest-time, would in many cases subvert an important object of the rule, the encouragement of husbandry, and open a fruitful source of unseemly litigation. A tenant in failing health, especially if he had expressed a belief that his end was near, would naturally hesitate to put in crops which might be successfully claimed by his successor in title, or in respect to which his estate might become involved in litigation.

The question asked by the defendants of a witness as to the customary mode of sowing rye and preparing the ground for it, was properly excluded. We have shown that the plaintiff had a right to sow the rye for his own use, and it was a matter of no consequence to the remainderman how he did it. Nor did his right to the crop depend upon his cultivating the land according to the rules of good husbandry. If it was done in an unhusband-like manner and in such a way that the crop would be an inconsiderable one, it would be wholly his own loss. The fact of his hurried and imperfect mode of sowing the land may have been of pertinence to the question whether he was in reality sowing rye or only pretending to do so. But it was not offered for this purpose, but to show that he was acting in the belief that the tenant for life would die in a few days. But as we have already shown, this belief was of no importance. His right did not depend upon the condition of the tenant for life. And he would have no interest in putting any labor on the land as a matter of mere pretense, as he would only lose his labor by so doing.

There is no error in the judgment appealed from.

EMBLEMENTS PASS TO EXECUTOR upon death of life tenant, if not devised: *Bradshaw v. Ellis*, 2 Dev. & B. 20; 32 Am. Dec. 686, and note 689; *Dennet v. Hopkinson*, 66 Me. 350; 18 Am. Rep. 227; note to *Miles v. Miles*, 64 Am. Dec. 369; note to *Daniels v. Brown*, 69 Id. 512.

KEELER v. STEAD.

[56 CONNECTICUT, 501.]

JUDGMENT BY DISQUALIFIED JUSTICE VOID. — Where plaintiff's attorney, who fills up and signs the writ in the action, occupies the same office with the justice who renders the judgment, the latter is void, as such justice is disqualified to act under the act of Connecticut of 1875, chapter 27, section 1, providing that no justice shall try any civil action which shall be brought, or in which the writ or declaration shall have been filled up by his partner, or by any one occupying the same office or apartment with him. This statute is not affected by the statute of 1882, Connecticut General Statutes, section 672, which re-enacted and repealed an earlier statute relating to the same subject, but which did not expressly or impliedly repeal the act of 1875.

JUSTICE OF PEACE — WAIVER OF DISQUALIFICATION. — Connecticut General Statutes, section 676, provides that the disqualification of a justice to act in a case before him may be removed by consent of the parties in writing given in court, and this mode must be strictly followed, as no other will remove the disqualification. It cannot be removed or waived by proceeding to trial with knowledge of its existence, because the trial of the case, and judgment by the justice, are from want of power to act without legal effect, and void.

J. B. Hurlbutt, for the appellant.

J. A. Gray, for the appellee.

BEARDSLEY, J. This is a writ of error from the judgment of a justice of the peace, appealed to this court from the court of common pleas.

The plaintiff alleges in his complaint that the defendant in error, on the sixth day of October, 1886, recovered judgment against him in a civil action tried before a justice of the peace, and that such judgment is erroneous, because the plaintiff's attorney, who filled up and signed the writ in the action, then occupied the same office with the justice who rendered the judgment. The record of the proceedings before the justice is made a part of the complaint, by which it appears that the parties proceeded to trial before the justice, the defendant, now plaintiff in error, making no claim that the justice was disqualified to try and decide the cause.

The defendant in error demurred to the complaint, and the court rendered judgment sustaining the demurrer.

It is admitted that the magistrate who filled up and signed the writ occupied the same office with the justice before whom the case was tried. Was the justice thereby disqualified? and if so, did the defendant, now plaintiff in error, waive the disqualification, in legal effect, by proceeding to trial before him? These are the questions in the case.

The plaintiff in error claims that the justice was disqualified by the following statute: "No one shall act as justice of the peace in the trial of any civil action which shall have been brought, or in which the writ or declaration shall have been filled up, by his partner, or by any one occupying the same office or apartment with him": Acts of 1875, c. 37, sec. 1.

The defendant in error claims that this statute was not in force when the suit before the justice was brought and tried, but had been repealed. To understand this claim, it is necessary to refer to an earlier statute, which provided that "no judge or justice of the peace shall act as such in any civil action in which he or his partner, clerk or student, shall have drawn or filled up the writ or declaration, nor in any criminal matter." This act was passed in 1846 (Acts of 1846, c. 9), and is to be found in the Revision of 1875, page 60, section 4.

An act passed in 1882 re-enacted the provisions of this statute, and added to the words "partner, clerk, or student," contained in it, the further words "son, father, brother, father-in-law, brother-in-law, and son-in-law," and concluded by expressly repealing the act of 1846: Acts of 1882, c. 16. The defendant in error claims that it also impliedly repealed the statute of 1875, upon which the plaintiff in error relies.

The act of 1875 specifies a distinct ground of disqualification applying to civil actions only. There is no appearance of inconsistency between it and the act of 1882, nor do we discover any foundation for the claim that the act of 1882 was intended as a revision of the whole subject to which it relates, and a substitute for all the acts concerning it. The fact that the legislature, while repealing the earlier statute to which we have referred, did not repeal the act of 1875, shows that they designed that it should remain in force.

In 1887 an act was passed containing the provisions of the two acts of 1875 and 1882: Acts of 1887, c. 50. The defendant in error claims that it appears from this enactment that the legislature regarded the act of 1875 as having been before repealed. A sufficient explanation of this legislation is, that it was intended to embody in one statute the germane provisions of the two acts. The defendant says that the provision of the act of 1875 was not contained in the report of the revising committee to the legislature of 1887, and claims, as we understand him, that the legislature recognized the propriety of that omission in adopting their report. But the report was

not to go into effect until after it had been revised and corrected. Before it had been referred back to the committee for that purpose, the act of 1887, to which we have just referred, was passed, not improbably to remedy the omission in the report of the committee.

We conclude that the justice was disqualified to act in the case in question. This being so, the judgment rendered by him was void, unless the plaintiff in error in legal effect waived the disqualification.

The defendant claims that he did so by proceeding to trial, presumably with knowledge of the disqualification of the justice, as he has not alleged or proved that he was ignorant of it.

But as the justice was disqualified to act in the case, his action could have no legal validity or effect. Although it is a case of want of power to act, and not strictly one of want of jurisdiction, yet the result in both cases must be the same; the judgment must be void. And as in the case of want of jurisdiction there can be no waiver of the defect, and jurisdiction cannot be conferred even by the agreement of the parties, so here a waiver can have no effect, and an agreement of the parties could have none if it were not for a statute expressly providing for that mode of removing the disqualification. That statute provides that "when any justice of the peace shall be disqualified to act in any proceeding before him, he may act by consent of the parties in writing given thereto in court": Gen. Stats., sec. 676.

This mode having been thus provided must be followed if the parties desire to remove the disqualification; while a mere waiver of all objection to the disqualification by the conduct of one of the parties, or in any other mode, can have no effect whatever.

It is with regret that we feel ourselves compelled to come to this result. We should be glad to hold that the plaintiff in error is estopped by his conduct from claiming that the justice was disqualified to act. But in our view of the law we cannot give this effect to his conduct. The legislature alone can furnish a remedy for the evil, for such we regard it.

The judgment of the court of common pleas was erroneous, and is reversed.

CARPENTER, J., was of opinion that the acting of the justice under the disqualification was an irregularity that could be

waived, and was not absolutely void; and that the conduct of the plaintiff in error in going to trial before him with knowledge of the disqualification was a waiver of objection to it, and that he was estopped from setting it up in the present case.

JUSTICE'S JUDGMENT MUST SHOW that statutory requirements have been complied with; otherwise it is void: *Beach v. Botsford*, 1 Doug. (Mich.) 199; 40 Am. Dec. 45, and note; *Levy v. Shurman*, 6 Ark. 182; 42 Am. Dec. 690.

JUDGMENT BY DISQUALIFIED JUDGE OR JUSTICE: Note to *Moses v. Julian*, 84 Am. Dec. 126-128.

WAIVER OF DISQUALIFICATION IN JUDGE OR JUSTICE: *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114, and note 130. But in absence of statutory provision, it has been held that consent of parties cannot confer jurisdiction as to the subject-matter of an action: *Richards v. Lake Shore etc. R'y Co.*, 124 Ill. 516; though where a court has jurisdiction of the subject-matter, consent of parties will confer jurisdiction of the persons: *Grimmett v. Askew*, 48 Ark. 151. In North Carolina, while consent of parties cannot give jurisdiction ordinarily, where the complaint fails to show jurisdiction as to person and subject-matter, yet if the court would otherwise really have such jurisdiction, consent of the parties may authorize an amendment whereby such jurisdiction is made to appear in the complaint: *Charlotte Planing Mills v. McNinch*, 99 N. C. 517.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

COYNE v. PEOPLE.

[124 ILLINOIS, 17.]

- TO WARRANT A CONVICTION FOR INCITING OR PROCURING A PERSON TO COMMIT PERJURY**, under section 228 of the Illinois Criminal Code, it must appear that the accused urged such person to give false testimony, knowing that he as well as himself was aware of its falsity, since the person so urged could not be guilty of perjury unless he himself knew such proposed testimony would be false; if he believed it to be true, the crime contemplated by the provisions of section 228 does not exist.
- TO CONSTITUTE THE CRIME OF PERJURY**, there must be a willful, corrupt, and false swearing or affirming; the testimony must be material to the issue or point in question; the witness must know the statements so made by him to be false, and they must be given with the intent to mislead the court or jury.

E. D. Sweeney, for the plaintiff in error.

George Hunt, attorney-general, for the state.

MAGRUDER, J. Plaintiff in error was indicted by the grand jury of Rock Island County at the September term, 1886, of the circuit court of that county, for endeavoring to incite and procure one Margaretha Fluegel to commit perjury. The case was tried at the following January term, and the plaintiff in error was found guilty by the jury. His term of imprisonment was fixed at two and a half years in the penitentiary, and sentence was passed against him in accordance with the verdict.

On the twenty-sixth day of June, 1885, George H. Maish commenced an attachment suit in the circuit court of Scott

County, in the state of Iowa, against Henry Fluegel, alleging an indebtedness due from Fluegel of \$4,013.89, and that he was a non-resident of Iowa. The attachment writ was levied upon a farm in Scott County, Iowa, called the Wapsie farm. This attachment suit was afterwards tried before a jury in December, 1885, and a verdict was rendered in favor of Fluegel and against Maish, and in March, 1886, a new trial was refused, and judgment entered on the verdict.

On the same day on which the attachment proceeding was begun, a petition was filed in said Scott County circuit court, in Iowa, on the equity side thereof, against Henry Fluegel and plaintiff in error, William L. Coyne, setting up the attachment proceeding and the levy upon the Wapsie farm, and alleging that the Wapsie farm was in truth and in fact the property of Henry Fluegel; that on December 8, 1884, Fluegel had made a deed of the farm to Coyne for the purpose of hindering, delaying, and defrauding his creditors, which deed was recorded on the day of its date in Scott County, Iowa; that there was no valid consideration for the deed, and that Fluegel made it with the intent to place his property beyond the reach of his creditors; that Coyne held the land in trust for Fluegel, and for the purpose of helping the latter to defraud his creditors, and that they were about to make sale of it, etc. The petition prays for an injunction against the sale, and that the deed be set aside and canceled, and the land subjected to the payment of the debt of Maish. On October 21, 1885, Coyne and Fluegel filed a demurrer to the petition, which demurrer does not appear to have ever been disposed of.

The deed of the Wapsie farm, which Henry Fluegel and Margaretha Fluegel, his wife, made to the plaintiff in error on December 8, 1884, recites that it is made subject to a mortgage of two thousand six hundred dollars, held by one Quinn, the payment of which plaintiff in error assumes. It is claimed by plaintiff in error that he purchased the Wapsie farm of Henry Fluegel in good faith, and paid him therefor by deed-ing to his wife, at his request, a house and lot on Eighteenth Street, in the city of Rock Island, at three thousand seven hundred dollars, by surrendering a note against him for five hundred dollars, and a claim against him of two hundred dollars for services rendered, and by assuming the mortgage for two thousand six hundred dollars.

A deed, dated December 8, 1884, was made by Coyne to Margaretha Fluegel, and is introduced in evidence. This deed

recites that it is made for a consideration of three thousand dollars and subject to a mortgage of seven hundred dollars held by one Eve McKinstry, the payment of which is not assumed by Margaretha Fluegel, the grantee in the deed.

Plaintiff in error was indicted and tried and convicted upon a charge of endeavoring in Rock Island County, Illinois, to incite and procure Margaretha Fluegel to appear as a witness on the trial in Scott County, Iowa, of the said equity cause of *Maish v. Fluegel and Coyne*, or on the taking of proof in said cause on behalf of her husband and Coyne, and to swear that the conveyance of the Wapsie farm by her husband to Coyne was a "right trade," that is to say, a valid and *bona fide* transfer, and that Coyne gave to her husband for the farm the note for five hundred dollars, the claim for two hundred dollars, and the house and lot on Eighteenth Street, valued at three thousand dollars, and assumed the mortgages for two thousand six hundred dollars and seven hundred dollars.

The indictment charges that the deed of the Wapsie farm was made by Fluegel without consideration and to hinder and defraud creditors, and was not a good and valid trade, and that the conveyance of the house and lot by Coyne to Fluegel was not made for the consideration of three thousand seven hundred dollars, but was merely a conveyance in trust, and that Fluegel did not owe either the five hundred dollars or the two hundred dollars, and that Coyne did not assume the payment of the two thousand six hundred dollars, etc., and that all these facts were well known to the said Coyne, etc.

The prosecution in this case was conducted mainly by the attorneys of Maish rather than by the prosecuting attorney of Rock Island County. It may have been perfectly right and proper for the district attorney to call in other counsel to assist him, but an examination of the record makes upon our minds the decided impression that a criminal proceeding has been resorted to to force the collection of a civil debt. Maish was trying to subject the Wapsie farm in Iowa to the payment of a debt of \$4,013.89, which he claimed to be due to him from Fluegel; and in order to do this, he was obliged to show that the farm belonged to Fluegel, and not to Coyne. His success in this direction would certainly be much easier with Coyne in the penitentiary and his character as a witness broken down.

On the trial in the court below, two issues were presented to the jury. The first issue was as to the truth or falsity of the

alleged facts, which Coyne is charged with having endeavored to incite Mrs. Fluegel to swear to: In other words, was the deed of the farm from Fluegel to Coyne a *bona fide* sale? or was it fraudulent and without consideration? Upon both sides of this question there was introduced a large mass of testimony, both documentary and oral. Coyne swore that he bought the farm in good faith and paid the consideration already stated; Fluegel and his wife swore that the deed made by them was without consideration. It is proven beyond question, that after he received his deed, Coyne went into possession of the Iowa farm and rented it and collected the rents, and it is also proven beyond question, that after Mrs. Fluegel received her deed of the house and lot, she and her husband went into possession and lived in the house and made repairs and changes in it, and rented a part of it to other parties. Evidence, properly introducible in a chancery proceeding to set aside a deed, was presented before the jury to substantiate a criminal charge, and owing to the complicated nature of such evidence, a careful study of it will leave upon the candid mind a serious doubt as to whether the real truth of the matter lies with one party or the other.

The second issue presented before the jury was, whether or not the plaintiff in error endeavored to incite and procure Mrs. Fluegel to testify to the matters already referred to. The witnesses as to the endeavor to so incite and procure Mrs. Fluegel to swear to falsehoods were Mrs. Fluegel herself, her husband, Henry Fluegel, and her husband's brother, Michael Fluegel, all of whom are contradicted by plaintiff in error. Henry Fluegel had the strongest motives of interest to sustain the prosecution against Coyne. As a result of the success of that prosecution he might get rid of his debt to Maish, and of other debts for which he had confessed judgments. His testimony bears such ear-marks as justify the greatest caution in its acceptance. He not only admits that he was party to an outrageous scheme to defraud his creditors, but he confesses that he agreed to swear to a lie, and wrote down false statements in German, for the purpose of having them learned by his own wife, that she might swear to them.

Henry, Margaretha, and Michael Fluegel swear that Coyne came into their store one day in August or September, 1885, and taking a seat upon the counter, told Mrs. Fluegel that when the trial should come off in Iowa she must swear that the sale of the Wapsie farm by her husband was *bona fide*, and

to the other matters above mentioned. Henry claims to have been present and heard what Coyne said to his wife; Michael, a German, who admits that he does not understand English very well, claims to have been in an adjoining room, and to have heard what Coyne said through the partition. As we understand the evidence, the incitement charged in the indictment consists solely and exclusively of what Coyne said to Mrs. Fluegel upon the particular occasion here referred to. She herself swears that only upon this one occasion did Coyne tell her what she must testify to.

The third instruction given on behalf of the people was as follows:—

“3. The court instructs the jury that the material allegations of the indictment in this case are: 1. That there was a bill in equity, filed in the district court of Scott County, Iowa, wherein George H. Maish was complainant, and the defendant and Henry Fluegel were defendants, in which it was substantially charged that Fluegel was the real owner of the Wapsie farm, and that Coyne had the same in trust and for the use of Fluegel. 2. Did the defendant, in the county of Rock Island and state of Illinois, attempt to incite or procure the witness Margaretha Fluegel to testify that the trade of said Fluegel to Coyne was a right trade; that Coyne gave the Eighteenth Street property at three thousand dollars, and Fluegel assumed the seven-hundred-dollar mortgage on said Eighteenth Street property, and that Coyne assumed the two-thousand-six-hundred-dollar mortgage on the Wapsie farm, and that Fluegel owed Coyne five hundred dollars on a note and two hundred dollars for services, and that said proposed testimony was material to said bill in equity, and was false? And if the jury believe, from the evidence, these propositions are proved beyond a reasonable doubt, then the jury should find the defendant guilty.”

Even if the jury had found that the propositions stated in the third instruction were proven beyond a reasonable doubt, the plaintiff in error may not have been guilty of endeavoring “to incite or procure” Mrs. Fluegel “to commit perjury.” Section 228 of the Criminal Code of this state provides that “whoever endeavors to incite or procure any other person to commit perjury, though no perjury is committed, shall be imprisoned,” etc.: Hurd’s Rev. Stats., c. 38. The crime which the prisoner was accused of endeavoring to incite another person to commit was perjury. Section 225 of our Criminal Code

thus defines perjury: "Every person having taken a lawful oath or made affirmation in any judicial proceeding, or in any other matter where by law an oath or affirmation is required, who shall swear or affirm willfully, corruptly, and falsely in a matter material to the issue or point in question, . . . shall be deemed guilty of perjury," etc.

To commit perjury, a person must "willfully, corruptly, and falsely" swear or affirm. The false assertion made by the witness under oath must be known to such witness to be false, and must be intended by him or her to mislead the court or jury: 2 Wharton's Crim. Law, 9th ed., sec. 1244.

The third instruction is erroneous, because it leaves out of view the element of corrupt intent on the part of the person incited. It in no way intimates that Mrs. Fluegel knew that what she was asked to swear to was false. The deed to her of the house and lot and the deed to Coyne of the farm were both absolute deeds upon their faces. The evidence tends to show that her own husband concurred in the statements made to her by Coyne as to what she was to say on the witness-stand. If she believed that what she was asked to testify to was true and did not know of its alleged falsity, then she would not have been guilty of perjury if she had sworn to it: 2 Wharton's Crim. Law, secs. 1245, 1246.

If plaintiff in error was trying to persuade Mrs. Fluegel that certain alleged facts were true, and to swear to them because of her belief that they were true, he was not endeavoring to incite her to commit perjury even though he knew that the testimony he wanted her to give was false. It must appear that he was urging her to give false testimony, knowing that she, as well as himself, was aware of its falsity. "Though a party who is charged with subornation of perjury knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would willfully testify to a fact knowing it to be false, he cannot be convicted of the crime charged": 2 Wharton's Crim. Law, sec. 1329.

An instruction similar to the one now under consideration was, for the reason here indicated, decided to be erroneous by the supreme court of Massachusetts in *Commonwealth v. Douglas*, 5 Met. 241; *United States v. Dennee*, 3 Wood, 39; *Stewart v. State*, 22 Ohio St. 477.

The fifth instruction given for the people was erroneous for the same reason here urged against the third, and neither of them was cured by any instruction that was given. The fifth

of defendant's refused instructions embodied the idea of guilty intent on the part of Mrs. Fluegel, and should have been given.

As already stated, the judicial proceeding in which the testimony of Mrs. Fluegel was to have been given was pending in the state of Iowa. The point is made and elaborately argued by counsel for the defense that a person in this state cannot be punished in a court of this state for inciting another person, also in this state, to commit perjury in a proceeding pending in another state. It is claimed that our statute upon this subject contemplates perjury committed in proceedings or matters pending in this state, and not in a foreign jurisdiction. We do not deem it necessary to discuss this question, and pass no opinion upon it.

The indictment in this case charges that perjury was a crime punishable by the laws of Iowa, and that the false swearing which the defendant is accused of having endeavored to incite would have constituted perjury under the laws of Iowa. It is also averred in the indictment that the false testimony in question could have been given under the laws of Iowa, or in other words, that Mrs. Fluegel would have been a competent witness for her husband in Iowa, though she could not have testified for him if the proceeding above described had been pending in Illinois.

The laws of Iowa were introduced in evidence. We have examined the definition of perjury as contained in the code of that state, and find it to be substantially the same as the definition given in our own statute. Therefore, if it be admitted that plaintiff in error can be punished for endeavoring to procure the commission of perjury in a suit pending in another state, the third and fifth instructions, considered with reference to the Iowa definition of perjury, as well as when considered with reference to the Illinois definition thereof, are erroneous in the respect already pointed out.

The judgment of the circuit court is reversed, and the cause remanded.

WHAT CONSTITUTES PERJURY, GENERALLY: See the extended note to *State v. Shupe*, 85 Am. Dec. 488-501.

SUBORNATION OF PERJURY, GENERALLY: See the note to *State v. Shupe*, 85 Am. Dec. 500, 501. Where defendants procured a person to make an affidavit, not knowing that the affiant was of unsound mind, and believing that she understood, assented to, and swore to the affidavit, they were held not criminally liable: *People v. Brown*, 74 Cal. 306.

BARRETT v. HINCKLEY.

[124 ILLINOIS, 32.]

TO RECOVER IN EJECTMENT, LEGAL TITLE MUST BE SHOWN in plaintiff; mere equitable title is not sufficient. Where the plaintiff seeks to recover lands, the title whereof he claims in fee-simple, he is bound to show in himself a legal, as contradistinguished from an equitable, title.

MORTGAGE. — THE TERM "ASSIGNMENT" does not, like the term "deed" or "specialty," signify an instrument under seal.

MORTGAGE — INSTRUMENT UNDER SEAL. — A WRITTEN ASSIGNMENT founded upon a valuable consideration is as available as an instrument under seal, to pass assignee the equitable title to land; but an instrument *inter partes*, in order to pass the legal title to real property, must be under seal.

EJECTMENT — RELATIVE LEGAL AND EQUITABLE RIGHTS OF ASSIGNEE OF NOTE AND MORTGAGE. — Mortgage is not assignable at law by mere indorsement, as in case of commercial paper, so as to pass the legal title in the instrument or clothe the assignee with the immunity of an innocent holder, except under certain circumstances; but where one by virtue of an assignment becomes the equitable owner of the note and mortgage, he may thereby obtain such an interest or equity in the land as to entitle him to have it sold in satisfaction of the debt.

THE MORTGAGEE MAY MAINTAIN EJECTMENT AS WELL BEFORE AS AFTER DEFAULT, unless there is an express provision that the mortgagor should retain possession till default in payment, since by the execution of the mortgage the entire legal estate passes to the mortgagee. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union, including Illinois, in which the common-law system prevails.

TITLE OF MORTGAGEE — CONVEYANCE OF LAND WITHOUT ASSIGNMENT OF THE DEBT. — The doctrine would seem to be fundamental that if one *sui juris* having the legal title to land intentionally delivers to another a deed therefor containing apt words of conveyance, the title at law at least will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter holds the legal title as trustee for the holder of the mortgage debt, though the interest which passes is of no appreciable value to the grantee.

EJECTMENT. — THE ESTATE AND INTEREST OF THE MORTGAGEE MAY BE CONVEYED BY DEED, ALTHOUGH IN FORM OF AN ASSIGNMENT, to the holder of the indebtedness, or even to a third party; such an assignee, if owner of the mortgage indebtedness, might no doubt maintain ejectment in his own name for his own use; or the action might be brought in his own name for the use of a third party owning the indebtedness.

EVIDENCE. — OUTSTANDING TITLE OF MORTGAGEE CANNOT BE SHOWN TO DEFEAT ACTION IN EJECTMENT brought by mortgagor.

TITLE OF MORTGAGEE IN FEE IS IN NATURE OF BASE OR DETERMINABLE FEE. The term of its existence is measured by the mortgage debt; when that is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law.

OWNER OF LEGAL TITLE MAY NOT MAINTAIN EJECTMENT UNDER ALL CIRCUMSTANCES. — This is particularly so in respect to a mortgage title;

therefore ejectment would not lie against a third party who is assignee from the mortgagee for a valuable consideration of the mortgage indebtedness.

EJECTMENT CANNOT BE MAINTAINED BY ONE HAVING A MERE NAKED TITLE TO LAND in which he has no beneficial interest, and in respect to which he has no duty to perform, against the equitable owner or any one having an equitable interest therein with a present right of possession.

EJECTMENT.—THE DISTINCTION BETWEEN THE RIGHTS OF THE MORTGAGEE AT LAW AND IN EQUITY considered at length under both the English and American view.

Whitehead and Packard, for the appellants.

Wilson and Moore, for the appellee.

MULKEY, J. Watson S. Hinckley, claiming to be the owner in fee of the land in controversy, on the twenty-sixth day of February, 1885, brought an action of ejectment in the superior court of Cook County, against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court, without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed.

The evidence tends to show the following state of facts: In 1870, Thomas Kearns was in possession of the land, claiming to own it in fee-simple. On August 3d of that year, he sold and conveyed it to William H. W. Cushman for the sum of eighty thousand dollars. Cushman gave his four notes to Kearns for the balance of the purchase-money, — one for \$12,500, maturing in thirty days, three for \$16,875 each, maturing respectively in two, three, and four years after date, and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878, Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum in his own right, and Mrs. Kearns as administratrix of her husband, for value sold and assigned, by a separate instrument in writing, the mortgage and note to the appellee, Watson S. Hinckley.

This is, in substance, the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, in the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the rulings of the court in this respect. They, however, go further, and insist that, even conceding the facts to be as claimed by appellee himself, they are not sufficient in law to sustain the action. As the judgment below will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned.

We propose to state, as briefly as may be, some of the reasons which have led us to the conclusion reached. In doing so, it is perhaps proper to call attention, at the outset, to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee-simple. To do this, he is bound to show in himself a fee-simple title at law, as contradistinguished from an equitable fee: *Fischer v. Eslaman*, 68 Ill. 78; *Wales v. Bogue*, 31 Id. 464; *Fleming v. Carter*, 70 Id. 286; *Dawson v. Hayden*, 67 Id. 52. Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns as administratrix of her husband, and Greenebaum as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns's estate, and Elias Greenebaum, the banker. At the time of the purchase, a separate writing was given to me,—a full assignment. . . . It was a very explicit assignment, or full assignment of the note and mortgage and the land, the property, and all the right and title to the land." It will be observed the instrument is throughout characterized as an

assignment only, which does not, like the term "deed" or "specialty," signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness's opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows that, even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum, or either of them, it could not have passed to the appellee by that instrument; and if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is, of course, based upon the fundamental principle that an instrument *inter partes*, in order to pass the legal title to real property, must be under seal.

But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. *Nemo plus juris ad alium transferre potest quam ipse habet*. That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff, is demonstrable by the plainest principles of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it, by way of mortgage, to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the states of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry, it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded.

that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear, appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do or attempt to do. Indeed, he does not claim through them, nor either of them. Not only so, neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee. Nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, What effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity, or of law, are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title: *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 Id. 213; *Chickering v. Raymond*, 15 Id. 362. As to the mortgage, it is well settled that could not be assigned, like negotiable paper, so as to pass the legal title in the instrument, or clothe the assignee with the immunity of an innocent holder, except under certain circumstances, which do not apply here: *Chicago, D., & V. R'y Co. v. Loewenthal*, 93 Ill. 433; *Hamilton County v. Lubukee*, 51 Id. 415; *Olds v. Cummings*, 31 Id. 188; *McIntire v. Yates*, 104 Id. 491; *Fortier v. Darst*, 31 Id. 213. But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject: 2 Washburn on Real Property, 115, and authorities there cited. Yet the assignors in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that, by virtue of the assignment, the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest

or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is, perhaps, no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment, as well before as after default. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union, including our own, in which the common-law system prevails.

In *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354, which was ejectment by the mortgagee against the assignee of the mortgagor, to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American states, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition; citing *Coot on Mortgages*, 339; *Blaney v. Bearce*, 2 Me. 132; *Brown v. Cramer*, 1 N. H. 169; *Hobart v. Sanborn*, 13 Id. 226; 38 Am. Dec. 483; *Northampton Paper Mills v. Ames*, 8 Met. 1. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson v. Pinegar*, 30 Ill. 481, which was a bill by a mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee as against the mortgagor and all claiming under him. He had the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner." So in *Oldham v. Pfleger*, 84 Id. 102, which

was ejectment by the heirs of the mortgagor against the grantee of the mortgage, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law, the owner of the fee, having the *jus in re* as well as the *jus ad rem*." In *Finlon v. Clark*, 118 Ill. 32, the same doctrine is announced, and the cases above cited are referred to with approval: *Taylor v. Adams*, 115 Id. 574.

Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the encumbrance of the mortgage; that the interest of the mortgagee was simply a lien and encumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity. These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was of course necessary to make his title available in a court of law.

In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country, resulting chiefly from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles

applicable to them, respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of laws. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the states, and the failure of the courts and authors to note those changes in their expositions of the law of such states. Perhaps another fruitful source of confusion on this subject is the fact that in many of the states the common-law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the action, in theory, is one at law, it is nevertheless subject to be defeated by a purely equitable defense.

Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has, in many of these states, entirely superseded the legal one. Thus in New York it is said, in the case *Trustees of Union College v. Wheeler*, 61 N. Y. 88, "that a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon, the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that state that ejectment under the code will not lie, at the suit of the mortgagee, against the owner of the equity of redemption: *Murray v. Walker*, 31 Id. 399. In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee, before foreclosure, without an assignment of the debt, is, in law, a nullity: *Jackson v. Curtis*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 231; 14 Am. Dec. 458; *Jackson v. Willard*, 4 Johns. 41. And this court seems to have recognized the same rule as obtaining in this state in *Delano v. Bennett*, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the

authorities already cited. The doctrine would seem to be fundamental, that if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor containing apt words of conveyance, the title, at law at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt: *Sanger v. Bancroft*, 12 Gray, 367; *Barnard v. Eaton* 2 Cush. 304; *Jackson v. Willard*, 4 Johns. 40. It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In 4 Wait's Actions and Defenses, page 565, the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, Pomeroy, in his work on equity jurisprudence (volume 3, page 150), in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death, intestate, it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such; and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator."

We have already seen that, under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper; but, on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even to a third party, by deed, with apt words of conveyance, and the fact that it is, in form, an assignment will make no difference: 2 Washburn on Real Property, 115, 116. Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name for his own use; or the action might be brought in his name for the use of a third party owning the indebtedness:

Kilgour v. Gockley, 83 Ill. 109. So in this case, if the action had been brought in the name of Kearns's heirs, for the use of Hinckley, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this state precisely as it did in England prior to its adoption in this country; for such is not the case. It is a conceded fact that the equitable theory of a mortgage has, in process of time, made in this state, as in others, material encroachments upon the legal theory which is now fully recognized in courts of law. Thus it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns: *Hall v. Lance*, 25 Ill. 250, *277; *Emory v. Keighan*, 88 Id. 482. As a result of this doctrine, it follows that, in ejectment by the mortgagor against a third party, the defendant cannot defeat the action by showing an outstanding title in the mortgagee: *Hall v. Lance, supra*. So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law: *Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 Id. 44; 81 Am. Dec. 259; *Gibson v. Rees*, 50 Ill. 383.

Hence the rule is as well established at law as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment that the plaintiff show in himself the legal title to the property, as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title, he may, under all circumstances, maintain the action; and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests,—that is, as a means of coercing payment. If the mortgagee, therefore, should for a valuable consideration assign the mortgage indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter.

for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well-settled principle that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who hold the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others: *Cottrell v. Adams*, 2 Biss: 351; 9 Myer's Fed. Dec. 240. The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See also *Speer v. Haddock*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

PLAINTIFF IN EJECTMENT MUST RECOVER ON THE STRENGTH OF HIS OWN TITLE: *Greve v. Coffin*, 14 Minn. 345; 100 Am. Dec. 229, and note; *Walker v. Fox*, 85 Tenn. 154. But in Virginia, it has been held, where plaintiff and defendant derive title from same third person, it is *prima facie* sufficient for plaintiff to prove such common derivation, without proving the title of such third party: *Laidley v. Land Co.*, 30 W. Va. 505.

PLAINTIFF IN EJECTMENT, IN ORDER TO RECOVER, MUST SHOW LEGAL TITLE TO BE IN HIMSELF: *Huntington v. Jewett*, 25 Iowa, 249; 95 Am. Dec. 788; equitable title being regarded as unavailing for a recovery or defense against the legal title: *Prentiss v. Brewer*, 17 Wis. 635; 86 Am. Dec. 730; though under the codes an equitable title may be set up in defense: *Shawhan v. Long*, 26 Iowa, 488; 96 Am. Dec. 164; *Meeker v. Dalton*, 75 Cal. 154.

NO PARTICULAR FORM IS NECESSARY TO CONSTITUTE ASSIGNMENT; it may be verbal or in writing: *Moore v. Lowrey*, 25 Iowa, 336; 95 Am. Dec. 790; *Switzer v. Noffsinger*, 82 Va. 518.

INDORSEMENT OF NOTE SECURED BY MORTGAGE OPERATES AS EQUITABLE ASSIGNMENT of mortgage: *Connecticut etc. Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655, and note

ASSIGNMENT OF DEBT CARRIES THE SECURITY: *Switzer v. Noffsinger*, 82 Va. 518.

GROFF v. ANKENBRANDT.

[124 ILLINOIS, 51.]

PLEADING. — DECLARATION IN TRESPASS FOR OBSTRUCTING FLOW OF WATER AND OVERFLOWING PLAINTIFF'S LAND to his injury is defective if it fails to aver that defendant was notified or requested to remove the obstruction.

PARTY'S PLEADING IS TO BE TAKEN MOST STRONGLY AGAINST HIMSELF, and most favorably to his adversary.

CONTINUING NUISANCE — DAMAGES — AVERMENT OF REQUEST TO REMOVE SAME. — Where a party comes into possession of land as grantee or lessee with an existing nuisance upon such land, and he merely permits the nuisance to remain or continue, he cannot be held liable in action for damages until he has been first notified or requested to remove the nuisance.

NUISANCE. — IT IS NECESSARY TO AVER THAT THE NATURAL FLOW OF WATER HAS BEEN OBSTRUCTED, in action for obstructing water and overflowing plaintiff's land, for otherwise the complaint is susceptible of the construction that the waters whose flow was obstructed were such as the owner of the servient tenement was under no obligation to receive.

Bell and Green, for the plaintiff in error.

S. Z. Landes, and Foster and Campbell, for the defendant in error.

MAGRUDER, J. This is an action of trespass on the case, brought on November 2, 1885, by appellant, in the circuit court of Wabash County, against appellee for obstructing the flow of water and throwing it back upon appellant's land, so as to overflow the same and make it unfit for cultivation.

Pleas of not guilty and of the statute of limitations were filed to the first count of the declaration, and issues were joined thereon. During the trial upon the issues thus formed, the plaintiff was given leave to file and did file an amended or additional count, to which the defendant put in a general demurrer. The demurrer was sustained, and plaintiff elected to stand by his amended or additional count, and judgment was rendered against him for the costs in and about the same, etc. The cause then proceeded to trial upon the first count and the pleas thereto, and the jury returned a verdict in favor of the defendant. Motion for new trial was overruled, and judgment rendered upon the verdict, which judgment has been affirmed by the appellate court. The case is brought before us by writ of error to the appellate court.

The sole question brought to our attention in the arguments of counsel is the sufficiency of the amended or additional

count, and whether or not the demurrer thereto was properly sustained.

The amended count alleges that plaintiff was "lawfully possessed" of the north half of the southeast quarter of section 13, etc., which was improved and used for purposes of cultivation; that defendant was "lawfully possessed" of the northeast quarter of the southwest quarter and the southeast quarter of the southwest quarter of said section, adjoining plaintiff's land on the west; that on, to wit, March 1, 1881, and between that day and the commencement of the suit, the defendant, "by means of a certain levee or embankment, maintained and continued by the said defendant along the east line of his said real estate, of great dimensions, to wit, of the width of six feet and of the height of two feet, and without sufficient openings therein to permit the free passage of water, wrongfully and unlawfully obstructed the flow of large quantities of water flowing to and against the said levee or embankment on the east side thereof, and flowing down along the north side of the south half of the southeast quarter of said section 13, and thereby caused said water, which otherwise would not have flowed onto the said real estate of the said plaintiff, to flow upon and stand on the said real estate of the said plaintiff."

This count is defective because it does not aver that defendant was notified or requested to remove the obstruction complained of: 1 Chitty's Pleading, 89, 389; 2 Id. 770, note h; Cooley on Torts, 611; Angell on Watercourses, Perkins's 6th ed., sec. 403; 1 Hilliard on Torts, 603, note a.

It is a well-established rule that "each party's pleading is to be taken most strongly against himself and most favorably to his adversary": Gould's Pleading, 141. The amended count will, therefore, be most strongly construed against the plaintiff. Inasmuch as the count does not state that the levee or embankment was erected by the defendant or originally placed by him where it is, it will be presumed that such levee or embankment was already upon the land when the defendant became possessed of it, and that consequently he was only responsible for allowing the obstruction to remain as it was when the premises came into his hands. The first count of the declaration averred that defendant "constructed and built and maintained and continued" the levee; the second or amended count merely charges that defendant "maintained and continued" the levee or embankment.

Where a party comes into possession of land, as grantee or lessee, with an existing nuisance upon such land, and he merely permits the nuisance to remain or continue, he cannot be held liable in an action for damages until he has been first notified or requested to remove the nuisance. It is not right that one who did not put the nuisance upon the premises in the first place should be held responsible for injuries that may not have been caused by any act of his own. As was said in *Johnson v. Lewis*, 13 Conn. 303, 25 Am. Dec. 405: "A plaintiff ought not to rest in silence, and presently surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance." Angell in his work on watercourses, *supra*, says "that where a party was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before any action can be brought."

While there is some conflict among the authorities upon this subject, the weight of authority seems to be in favor of the doctrine here announced, as will be seen by reference to the following cases: *Penruddock's Case*, 3 Coke, 205; *Pierson v. Glean*, 14 N. J. L. 36; 25 Am. Dec. 497; *Johnson v. Lewis*, 13 Conn. 303; 33 Am. Dec. 405; *Noyes v. Stillman*, 24 Id. 14; *Curtice v. Thompson*, 19 N. H. 471; *Carleton v. Redington*, 21 Id. 291; *Eastman v. Amoskeag Mfg. Co.*, 44 Id. 143; 82 Am. Dec. 201; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; *Nichols v. City of Boston*, 98 Mass. 39; 93 Am. Dec. 132; *Ray v. Sellers*, 1 Duvall, 254; *West v. L. C. & L. R. R. Co.*, 8 Bush, 404; *Slight v. Gutzlaff*, 35 Wis. 675; 17 Am. Dec. 476; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396.

The cases which hold that a defendant may be held liable for the continuance of a nuisance erected by another on his land, without any request or notice to him to remove the same, will generally be found, upon examination, to be cases where there has been, on the part of such defendant, some active participation in the continuance of the nuisance, or some positive act evidencing its adoption, or some use of the structure complained of as a nuisance,—like the operation of a factory which emits injurious and unwholesome smells. In the latter case, every act of using is a new nuisance, for which the party injured has a remedy for his damages.

The declaration in this case is defective for another reason. The passage of water, which the owner of the servient heritage has no right to stop by embankments or other artificial means,

so as to throw it back upon the owner of the dominant heritage, is the natural flow of water. Such natural flow of water consists either of surface water, derived from the rain or snow falling upon the dominant field, or of the water in some natural watercourse, fed by remote springs, or rising in a spring upon the dominant field itself: *Gillham v. Madison County R. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Id. 158. The declaration charges that the defendant has "obstructed the flow of large quantities of water flowing to and against the said levee or embankment," but it nowhere avers that the natural flow of water has been obstructed. *Non constat* but that the water alleged to have been obstructed by the embankment was not properly turned in that direction, or did not naturally flow from plaintiff's land over or upon defendant's land, either by reason of being surface water or water in a natural watercourse. If there was no natural flow of water from plaintiff's farm to and upon defendant's farm, plaintiff had no right to complain of the embankment.

For the reasons here stated, we think that the demurrer to the amended count was properly sustained.

The judgment of the appellate court is therefore affirmed.

PLEADING IS TO BE CONSTRUED MOST STRONGLY AGAINST PLEADER: *Chipman v. Emeni*, 5 Cal. 49; 63 Am. Dec. 80; *Green v. Covilland*, 10 Cal. 317; 70 Am. Dec. 725.

GRANTEE OF PREMISES ON WHICH NUISANCE WAS ERRECTED BY HIS GRANTOR is not liable for continuance thereof until, upon request, he refuses to remove the nuisance: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; 82 Am. Dec. 201, and note; *Nichols v. City of Boston*, 98 Mass. 39; 93 Am. Dec. 132, and note; *Slight v. Gutzlaff*, 35 Wis. 675; 17 Am. Rep. 476.

UPPER LAND-OWNER HAS EASEMENT OF DRAINAGE IN LAND OF LOWER PROPRIETOR: *Boynnton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781, and note; *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570.

MARMON v. HARWOOD.

[124 ILLINOIS, 104.]

VOLUNTARY CONVEYANCE TO A WIFE OR CHILD IS FRAUDULENT AS TO PRE-EXISTING CREDITORS, if made when the donor is in embarrassed financial circumstances, even though he retains estate nominally equal in value to, or more than equal to, all his indebtedness, when the property retained proves insufficient to discharge all his liabilities.

FRAUDULENT CONVEYANCE—WHAT MAY HAVE BEEN ACTUALLY PASSING IN GRANTOR'S MIND IS IMMATERIAL.—If a conveyance is voluntary, and results in hindering, delaying, or defrauding creditors, it must be regarded as fraudulent in law; the donor's act need not be immoral or corrupt.

VOUNTARY CONVEYANCE — CREDITOR'S BILL — GRANTEE'S MOTIVE UNIMPORTANT. — Where bill is brought to impeach voluntary conveyance by a debtor, the motive of grantee does not determine validity of transfer, except, perhaps, in cases where he parts with a valuable consideration.

James S. Ewing and Hamilton Spencer, for the appellant.

Kerrick, Lucas, and Spencer, for the appellees.

CRAIG, J. This was a creditor's bill, brought by Thomas F. and Willis S. Harwood, in the circuit court of McLean County, against Mary A. Marmon, Maria Paist, Owen L. Cheney, Mary L. Cheney, his wife, and William W. Marmon. The object of the bill was to set aside certain deeds executed by Maria Paist to Mary A. Marmon and Mary L. Cheney, whereby certain real estate was conveyed to them, and subject the property to the payment of a judgment which complainants had recovered against Maria Paist. Upon the hearing in the circuit court, on the pleadings and evidence, a decree was rendered in favor of the complainants. Mary A. Marmon appealed to the appellate court, where the decree was affirmed. To reverse that judgment she has appealed to this court.

There is no material conflict in the evidence, nor do the parties disagree in regard to the facts established by the evidence upon which the decree was rendered; but it is insisted that the conveyance from Maria Paist to Mary A. Marmon was not fraudulent as against creditors; that at the time the deed was executed she retained property sufficient to pay all her debts, and for this reason the decree was erroneous.

It appears from the evidence that in the month of April, 1884, Maria Paist, and her son, O. L. Cheney, executed and delivered to H. T. Levin a promissory note for \$3,556, due in two years, with interest at seven per cent per annum. This note was sold to the complainants, and they recovered a judgment upon it for \$4,053.84. On April 30, 1886, an execution was issued upon the judgment, and returned no property found. At the time the note was executed, Maria Paist was the owner in fee of lot 16, the east half of lot 17, and the south half of lot 19, all in White's addition, and was the owner of lot 6, of assessor's subdivision of lots 50, 51, 52, 53, and 54, of the original town, all in the city of Bloomington, and the east half of lot 4, in block 1, in Normal. She also had notes, made by W. W. Marmon, for about two thousand three hundred dollars. The first-mentioned piece of property is known as

the "homestead," the second piece as the "Cheney homestead," and the third as the "Hammerslaugh building." Appellant and O. L. Cheney are the daughter and son of Maria Paist, and Mary Cheney is the wife of O. L. Cheney.

On the fifth day of November, 1884, Mrs. Paist made two deeds, — i. e., one to appellant for the homestead, reciting a consideration of seven thousand dollars; the other to Mary Cheney, for the Cheney homestead, the Hammerslaugh building, and the Normal property. The homestead, which was conveyed to appellant, was clear from encumbrance, and worth seven thousand dollars. The Cheney homestead was encumbered for one thousand dollars, but was worth two thousand five hundred dollars. The Hammerslaugh property was mortgaged for some eight thousand dollars, but worth four thousand dollars above the mortgage. The lots in Normal were worth three hundred dollars. The deeds purporting to convey the property to appellant and to Mary Cheney were executed without consideration. At the time of these conveyances, Mrs. Paist was indebted on a promissory note, which she had signed with her son, in the sum of one thousand dollars in addition to the debt she owed complainants. The property she conveyed without consideration exceeded in value thirteen thousand dollars. She retained no real estate, or property of any character, except notes of W. W. Marmon for two thousand three hundred dollars, and a note, secured by a second mortgage on the fair-grounds at Bloomington, for six thousand dollars. This claim was subject to a prior mortgage of over eleven thousand dollars, held by one Brokaw. On the sixteenth day of March, 1885, the Hammerslaugh property was sold to Dr. Barnes for four thousand dollars, subject to the mortgage on the property. Soon after this sale, the fair-grounds, upon which Mrs. Paist held a second mortgage, were advertised for sale on the first mortgage, and at the sale Mrs. Paist became the purchaser for the amount of the debt and costs. Upon making the purchase, she paid five thousand dollars cash down, and gave a mortgage on the property to secure the remaining seven thousand dollars. The cash payment was made up of four thousand dollars which Mrs. Cheney had received from the sale of the Hammerslaugh property, and one thousand dollars which she borrowed. On the twenty-ninth day of September, 1885, Maria Paist conveyed the fair-grounds to James B. Stevenson for seven thousand five hundred dollars, subject to the mort-

gage she had given of eight thousand dollars. She received cash, two thousand dollars; Normal property, two thousand five hundred dollars; notes, three thousand dollars. The Normal property was soon sold, and the cash, notes, and proceeds of the Normal property were all turned over by Mrs. Paist to her son, O. L. Cheney; and he lost the entire amount on the Chicago Board of Trade. The notes Mrs. Paist held against Marmon had all been disposed of before complainant's debt matured, except a note for thirteen hundred dollars, which was turned over to secure attorney's fees to defend this suit.

In *Patterson v. McKinney*, 97 Ill. 41, where a voluntary conveyance of lands had been made by Patterson for the benefit of his wife, the grantor retaining property which exceeded in nominal value the total amount of his indebtedness existing at the time of the conveyance, it was insisted, as it is in this case, that the transaction was not fraudulent as against creditors; but the position was not sustained. In deciding the case the court held that a voluntary conveyance to a wife or child when the donor is in embarrassed financial circumstances is fraudulent as to pre-existing creditors, even though the party retains estate nominally in value equal to, or more than equal to, all his indebtedness, when the event shows that the property retained is in fact not sufficient to discharge all his liabilities. In the *Patterson* case, the grantor at the time he made the conveyance to his wife had more property than Maria Paist had when she conveyed to appellant, and was indebted to a greater extent; but this case cannot in principle be distinguished from the *Patterson* case. The principle which controlled the one must govern the other.

In April, 1884, when the note upon which complainants obtained judgment was executed, Maria Paist owned property (mostly real estate) exceeding in value thirteen thousand dollars, but when the judgment was rendered two years thereafter, she had no property liable to execution, and almost all her property had, between the date the note was given and the date of the judgment, been transferred to her children without consideration. Seven months after the note upon which complainants obtained judgment was given, Mrs. Paist conveyed to appellant the homestead,—the property here involved,—the property at the time being worth seven thousand dollars; but no consideration passed from the grantee to the grantor. It may be that Mrs. Paist did not, at the time she conveyed

this property to her daughter, design to defraud her creditors; or it may be that the transaction was not fraudulent in fact,—that she expected to pay her debts from the property she retained when she made the conveyance to appellant. But however that may be, we think it plain, from the evidence introduced on the hearing, the transaction is one which, as against pre-existing creditors, was fraudulent in law. What may have been in the mind of the grantor when she conveyed the property to her daughter is immaterial. The conveyance being voluntary, if it resulted in hindering, delaying, or defrauding creditors, it must be regarded as fraudulent in law. This view of the law is well expressed by Bump on Fraudulent Conveyances, sections 271, 272, as follows: “The law will not speculate about what is actually passing in the donor’s mind, for the act need not be immoral or corrupt. The law does not concern itself about the private or secret motives which may influence the debtor. It does not deal with his conscience. He may make a conveyance with the most upright intentions, really believing that he has a right to do so, and that it is his right and duty to do it; and yet, if the transfer is voluntary, and hinders, delays, or defrauds his creditors, it is fraudulent. . . . The debtor may have some other purpose in view, but the intent to defraud is a part and parcel of his act.”

It may be said that in accepting the conveyance appellant was innocent of any fraudulent intent. Conceding that to be the case, the transaction would not be relieved of a fraudulent character. Where a bill is brought to impeach a voluntary conveyance by a debtor, the motive of the grantee does not determine the validity of the transfer. It is the motive of the giver, and not the knowledge of the acceptor, that is to determine the validity of the transfer: Bump on Fraudulent Conveyances, sec. 280. Had the transfer been made for a good consideration, a different question might arise; but such was not the case.

Reference has been made in the argument to the fact that Mrs. Paist offered to sell the fair-grounds property to complainants, in payment of their debt, and also, upon the sale of that property, she placed a fund in the hands of O. L. Cheney amply sufficient to pay the debt, which he was directed to apply in that way. There are facts tending, doubtless, to show that Mrs. Paist did not intend, by the conveyance to her daughter, to defraud her creditors; but, as has been said before, it was not necessary to prove actual fraud in order to

impeach the transaction. When the deed was made to appellant, the grantor was indebted to the amount of five thousand dollars. Without securing or paying these debts, she conveyed to her daughter the largest portion of her estate without consideration, the property retained not being adequate, as the sequel showed, to discharge her debts. As was held in the Patterson case, *supra*, she had no right, as against her creditors, to make such a disposition of her property. As respects creditors, such a transaction was fraudulent in law. But aside from this, as to the fact that Mrs. Paist placed funds in the hands of her son, O. L. Cheney, to pay her indebtedness, was of no importance. He was insolvent, and known to be so, when the funds were placed in his hands, and an act of this character could be of no benefit to creditors, nor could it have any bearing on the case. Had the money been placed in the hands of a solvent party, the act might be regarded in a different light, as it might then have been anticipated that it would be paid over to creditors; but when the money was turned over to Cheney, Mrs. Paist must have known that it would be lost or squandered, as it was.

Objection is made to the form of the decree, but we do not regard it so informal as to require a modification.

The judgment will be affirmed.

VOLUNTARY CONVEYANCE MADE BY ONE WHO IS INDEBTED IS PRESUMED TO BE FRAUDULENT, and no circumstances will be permitted to repel the legal presumption of fraud: *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Wilder v. Brooks*, 88 Id. 49, and note discussing the question; *Lewis v. Linscott*, 37 Kan. 379.

WHETHER VOLUNTARY CONVEYANCE, ON A MERITORIOUS CONSIDERATION by a person deeply indebted, is really fraudulent as to existing creditors, is a question not of law, but of fact for the jury: *Coak v. Holbrook*, 146 Mass. 66.

GERARD v. BATES.

[124 ILLINOIS, 150.]

IN CASE OF AN EXECUTION AGAINST ONE ONLY OF SEVERAL PARTNERS, the proper mode is to levy upon and sell such partner's interest in the whole of the partnership effects, and not in specific articles of the partnership property.

PARTNER IS NECESSARY PARTY TO BILL FOR ACCOUNTING, where by sale on execution only part of his interest in the partnership is disposed of, and the purchaser seeks for a settlement and adjustment by such bill of the partnership affairs.

WHEN OBJECTION TO OMISSION OF PARTIES MAY BE TAKEN ON APPEAL. —

Where the parties omitted are mere formal parties, and not indispensable to a decision of the case upon its merits, it will be too late to make objection at the hearing; but where the rights of the parties not before the court are intimately connected with the matter in dispute, so that a final decree cannot be made without materially affecting their interests, the objection may be taken at the hearing, or on appeal, or on error.

Beach and Hodnett, for the appellant.

E. Lynch, and *Blinn and Hoblett*, for the appellee.

SHELDON, C. J. On April 21, 1885, Charles F. Gerard and Isaac Wert were the owners of a livery-stable, stock, and business in Lincoln, in this state, in partnership, doing business under the firm name of Wert & Co., Gerard's interest being three fourths and Wert's one fourth. On that day, Gerard sold to one James H. Danley an undivided half-interest in the livery stock of Wert & Co. for a half-section of land in Nebraska, taken at the valuation of three thousand two hundred dollars, Danley guaranteeing that the actual cash value of the land would be, in eighteen months thereafter, three thousand two hundred dollars, and that if not of that value, he agreed to pay to Gerard the difference between such sum and the value then, out of said livery stock. On the same date, and as a part of the same transaction, Gerard, Danley, and Wert entered into a partnership to conduct said livery business, and did carry on the same for a while. On June 17, 1885, two executions against Danley for \$621.25 and costs, and \$148.56, and costs, respectively, issued on judgments against him individually, in favor of one Harts, were levied upon the interest of Danley in certain enumerated articles of personal property of the partnership in the livery-stable. The property so levied upon was duly sold, and the appellee, Bates, who in the mean time had purchased the judgments from Harts, became the purchaser at the sale for \$769.91. Bates, on August 21, 1885, filed his bill of complaint herein against Wert and Gerard, alleging that he became by said purchase the absolute owner of an undivided one-half interest in said property; that Wert and Gerard refused to recognize his ownership, and praying for an account, and the appointment of a receiver. The defendants, by their answer, deny that the complainant is the absolute owner of an undivided one-half interest in the property, set up the contract with Danley as to the land, and aver that Danley's interest in the property could not be ascer-

tained until eighteen months after April 21, 1885, and that said time had not expired. A receiver was appointed, who made sale of the property of the firm. The net amount of the assets of the firm were found to be \$1,780.71, which the decree of the court divided as follows: To complainant, Bates, \$890.-35, to the defendant Gerard, \$445.18, and the same to the defendant Wert. No costs were adjudged against Bates, but they were ordered to be paid, three fourths by Gerard, and one fourth by Wert. It appeared from the evidence that on the first day of October, 1886, the Nebraska land was worth from four to five dollars per acre, and that Gerard was still the owner. The decree was affirmed by the appellate court for the third district, and the defendant Gerard alone appeals to this court.

The decree is claimed to be erroneous in two particulars: one, in that the decree allows Bates a half of certain assets of the partnership that were not levied upon and sold under the executions; and the other, the disallowance of Gerard's claim against Danley's interest in the event that the value of the Nebraska land should not be three thousand two hundred dollars at the expiration of eighteen months from April 21, 1885. The appellate court disposed of this last objection, on the ground that Gerard, by the representations he had made to Bates before his purchase, as to the value of Danley's interest, and the encouragement he had given him to buy the judgments, was estopped, as against Bates, to insist upon his contract with Danley. We do not find it necessary to consider this question, as we think there is error in the respect first above mentioned, which requires a reversal of the decree.

The decree seems to have proceeded upon the theory that the sale on the executions was of the interest of Danley in all the partnership property, whereas it was a sale of his interest in only a part of the property. The executions were levied on Danley's interest in certain specific articles of the partnership property, particularly enumerating them. There were \$279.45 of book-accounts of the firm, and some hay, oats, and other property of the firm, to the amount of seventy dollars, which were not levied upon and sold under the executions; and yet, by the decree, Bates is allowed to share in this property of the firm not levied on and sold, as assets of the partnership, giving to him, as his one half thereof, \$174.72, which he clearly was not entitled to. There was allowed to Bates, by the decree, the whole interest of Danley, which remained

upon the final adjustment of the partnership concerns. That interest Bates did not acquire by his purchase under the executions. He might have acquired it had there been a proper and different levy and sale, viz., of Danley's partnership interest, or of his interest in the whole of the partnership property. But it was here only a part of Danley's partnership interest which was levied upon and sold,—his interest in certain specific articles of partnership property which were only a part of the partnership property. That in such a case of an execution of a separate creditor against only one of several partners, the proper mode is to levy upon and sell the debtor partner's interest in the whole of the partnership effects, and not in specific articles of the partnership property: See 1 Lindley on Partnership, 710; Parsons on Partnership, 352; Freeman on Executions, secs. 125, 254; *Sirrine v. Briggs*, 31 Mich. 443.

But it is insisted that Gerard has got his full share, and there is no error which he can complain of,—that it is no cause of complaint to him that Bates receives more than he is entitled to. It is true that Gerard seems to get, by the decree, his full one-fourth share; but does it not concern him that Bates, in this accounting, is allowed more than he is entitled to receive,—the whole of Danley's interest instead of the part of that interest which he bought? Danley is not a party, and the accounting here will not be conclusive as to him. If the decree remains, Danley may file his bill and subject Gerard to another accounting, where Danley may be allowed for his unsold interest in the copartnership. Gerard should be subjected to the liability of but one accounting, and Danley should have been made a party to this suit, so that there would be need for only one account to be taken,—the one taken here,—which would be final and conclusive between all the copartners, and Bates.

As the objection of Danley not being made a party does not appear to have been taken before, but to be made in this court for the first time, it is insisted that it comes too late. In *Prentice v. Kimball*, 19 Ill. 323, it was said: "It is the usual and better practice, where the want of proper parties is apparent on the face of the bill, to take advantage of it by demurrer or motion to dismiss, or if not patent, by plea or answer. Where the parties omitted are mere formal parties, and not indispensable to a decision of the case upon its merits, it will be too late to make the objection at the hearing; but

where the rights of the parties not before the court are intimately connected with the matter in dispute, so that a final decree cannot be made without materially affecting their interests, as in this case, the objection may be taken at the hearing, or on appeal, or on error. Courts will, *ex officio*, take notice of such omission, and rule accordingly." And see *Spear v. Campbell*, 4 Scam. 426.

We think Danley was a necessary party, and that the objection on that account does not come too late, although made for the first time upon this appeal.

The judgment and decree of the courts below will be reversed, and the cause remanded to the circuit court of Logan County for further proceedings, with leave to the complainant to amend the bill and make James H. Danley a party defendant.

LEVY AND SALE ON EXECUTION OF PARTNERSHIP PROPERTY FOR INDIVIDUAL DEBT must be of the undivided interest of the debtor in such property: *Nixon v. Nash*, 12 Ohio St. 647; 80 Am. Dec. 390, and note. A levy on the firm property itself for such debts creates no lien in favor of such creditor: *Richard v. Allen*, 117 Pa. St. 199; 2 Am. St. Rep. 652, and note; see also *Williams v. Lewis*, 115 Ind. 45; *post*, p. 403.

DRENNAN v. BUNN.

[124 ILLINOIS, 175.]

VENDOR OF NEGOTIABLE BONDS OR NOTES WHO ASSIGNS THEM "WITHOUT RECOURSE" IS LIABLE ON IMPLIED WARRANTY, in the absence of express representation, for any deficiency between the amount apparently due upon the face of the instrument and the amount legally collectible upon it, although the deficiency arises from a successful interposition of the defense of usury whereby the collection of interest on the note is defeated.

VENDOR OF NEGOTIABLE NOTE IS CONCLUDED BY JUDGMENT OBTAINED IN SUIT OF WHICH HE HAD DUE NOTICE, between his vendee and the payor of the instrument, and in which suit the defense of usury was set up, although such vendor was not expressly requested to take charge of the suit, and the note was sold "without recourse."

ACTION to recover deficiency between amount apparently due upon the face of certain bonds and notes purchased by the plaintiff and the amount actually collected thereon by him. There were two certain promissory notes, for the amounts respectively of one thousand dollars and eight hundred dollars; to these notes were annexed twelve interest-bearing coupons at ten per cent per annum, payable semi-annually. These notes

and coupons were held by one Thomas J. Bunn, to whom they had been executed and delivered by R. C. Huskey and his wife, and they were secured by a deed of trust to one James H. Powell as trustee of lands owned by the wife. Subsequent to making and delivering the notes, coupons, and deed, the wife died, and the property was advertised for sale by the trustee under the deed, who at that time had no knowledge of the wife's decease. The plaintiff in this suit in consequence of such advertisement purchased the notes, etc., paying the sum due thereon, and a small additional sum for printing and advertising. To the plaintiff's suit to foreclose the trust deed, and to an action of ejectment for the land, the defense of usury was interposed and sustained, and the interest was declared forfeited. The defendant was notified that the foreclosure suit was pending, and requested to disprove the averment in that suit of usury, and his deposition was also taken upon that point. This action was then brought. The third, fourth, fifth, and sixth requests noted in the opinion were all substantially the same, and were to the effect "that the final decree in the circuit court in the case of *Frank P. Drennan v. R. C. Huskey et al.*, introduced in evidence in this cause," was, together with the fact that the defendant Bunn was notified of the pendency of that suit, and was requested to defend the claim of usury relied on as a defense therein, and that he appeared and testified as a witness, conclusive upon this defendant as to all matters contained therein, and established in this case the right of the plaintiff to recover.

Tipton and Beaver, for the appellant.

James S. Ewing, for the appellee.

Frank P. Drennan, *pro se*.

SCHOLFIELD, J. The circuit court, in effect, ruled, as a matter of law, and that ruling is affirmed by the judgment of the appellate court, that proof that appellee was notified of the pendency of the foreclosure suit, and of the defense of usury thereto interposed, and requested to rebut and disprove such defense, will not render the decree of foreclosure conclusive against appellee in this suit. Two questions for our consideration arise upon this ruling: 1. Is the vendor of negotiable bonds or notes, in the absence of express representation, and who assigns them "without recourse," liable, on an implied warranty, for any deficiency between the amount apparently

due upon the face of the instrument and the amount legally collectible upon it? 2. If liable, is he concluded by the judgment between his vendee and the payor of the instrument, by reason of having been notified in apt time of the pendency of the suit and of the defense of usury set up by the payor, although not expressly requested to take charge of the suit, and not notified that the vendee intends to hold him responsible for the result of the suit?

1. Daniel, in his work on negotiable instruments (3d ed., vol. 1, sec. 670), says: "When the indorsement is 'without recourse,' the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be, —the valid obligation of those whose names are upon it." And he then proceeds to show that the holder may recover against the indorser "without recourse," where the note was invalid between the original parties, because of the want or the illegality of the consideration, as well as in certain other cases: See also, to like effect, Parsons on Bills and Notes, 39.

In *Ticonic Bank v. Smiley*, 27 Me. 225, 46 Am. Dec. 593, an overdue note was transferred with the indorsement, "indorser not holden," and it was held the indorser was nevertheless liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it of which the note gave no indication, and the vendor gave no information.

In *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181, a negotiable promissory note was transferred by indorsement "without recourse." Suit was brought by the assignee upon the note, and the defense of usury was set up. It seems that by the law of Kansas, as by our statute, usury only forfeits the interest. The defense was sustained, and the assignee, in consequence, recovered \$229.50 less than the amount which, upon the face of the note, purported to be due thereon. The assignee thereupon sued the indorser, and recovered a judgment for this deficiency. It was held that the indorser, although he indorsed without recourse, was liable on the implied warranty that the note was valid for the amount expressed upon its face. Brewer, J., in delivering the opinion of the court, after a somewhat elaborate examination of the authorities bearing upon the question, said: "These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This

was a defect in the very inception of the note. It was known to the vendor, and it arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof": See also Randolph on Commercial Paper, sec. 720.

It is conceded by counsel for appellee that this case is precisely in point here, but it is contended that it was not correctly decided, because there was no fraud there, and in support of that contention it is argued that, unless that which is claimed to be fraud rendered the note absolutely void, and not merely voidable, it cannot be considered. No authority is cited in behalf of this contention, and, in our opinion, it is predicated upon a misconception of what is necessary to constitute a breach of an implied warranty. That which is absolutely void, in the sense of this contention, is incapable of ratification: See Bishop on Contracts, enlarged ed., secs. 610 et seq. But it is manifest a sale which will authorize an action for a breach of an implied warranty, in many if not in most cases, is but voidable. The purchaser may elect to waive his right to avoid it, and ratify it if he will. As illustrative of this may be mentioned all those cases where the buyer does not inspect the thing bought, but trusts to the vendor, and the quantity and kind of goods are delivered, but upon inspection they prove unsalable, by reason of defects in quality: See Benjamin on Sales, 1st Am. ed., 484; Bigelow on Fraud, 34, 35.

A note or bond given without consideration, whether voluntarily, or through mistake as to the state of indebtedness between the parties, or for a consideration that totally fails, as in consideration of a sale and warranty where the warranty is broken, is not absolutely void in the sense as here contended for by counsel; and yet, in the first two instances, there would be a total want of consideration, and in the last, a failure of consideration, which might be set up as defenses to the collection of the note in a suit by the payee, or by an assignee after maturity, or with notice, against the payor. But none of these defenses would be admissible to a suit by an assignee before maturity and without notice, as would any defense showing that the note was absolutely void: See Story on Bills, sec. 188.

Where money is paid by one party to another for a given article assumed to be sold, but the seller delivers to the purchaser only a worthless imitation of that article, there is a

legal fraud, and an action for money had and received will lie for the money thus paid for which nothing has been received: *Lunt v. Wrenn*, 113 Ill. 168; and see also Bigelow on Fraud, 35, *supra*. So if the buyer has paid for a certain quantity of goods, and the vendor has delivered only a part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient, for the parties in this case have, by their conduct, given an implied assent to a severance of the contract, by the delivery on the one part, and the acceptance on the other, of a portion only of the goods sold. This is, in its nature, a total failure of consideration for part of the price paid, as contradistinguished from cases of a partial failure of the whole: Benjamin on Sales, 1st Am. ed., 310, citing *Deveau v. Connolly*, 8 Com. B. 640. And so we said, in *Robinson v. McNeill*, 51 Ill. 225, where there had been a transfer of book-accounts by the defendant to the plaintiff, and suit was brought for a failure to realize the amount from the debtors: "The mere transfer of the accounts as unpaid amounted to a warranty that they were so, as Robinson knew whether he had received payment, and would be guilty of a fraud in selling as unpaid a debt which had been actually discharged." It is true that the defense of usury is personal to the borrower and his privies, and that it does not therefore render the instrument affected absolutely void, but only voidable; but in this respect, an instrument to which that defense may be interposed is in no wise different from instruments to which the defense of payment, or failure of consideration by reason of a fraudulent and deceitful sale, may be interposed. The borrower and his privies can alone set up the latter as well as the former defense.

The only instances of which we are aware, where it may be material to distinguish between that which renders an instrument absolutely void and that which renders it voidable when considered as a ground of defense, are in suits upon instruments negotiable by the law merchant. In certain cases, under that law, an assignee, before dishonor, will not be affected by defenses rendering the instrument voidable merely, as between the original payor and payee, but will be concluded by defenses rendering it absolutely void; but there is no question here as to the rights of parties under the law merchant, nor even under our statute in relation to negotiable instruments. The indorsement transferred title, and it gave no notice

of deceit in the sale. It is not claimed there is, under such an indorsement, liability by virtue of any contract of indorsement, and upon no principle that we are aware of is such an indorser, by the fact of indorsement, less liable for deceit in the sale than he would have been had he transferred a chose in action without indorsement, as in *Robinson v. McNeill, supra*.

That the sale of a chose in action, by the party to whom it is payable, expressed and understood to be for a given amount, but in fact subject to be reduced to a sum materially less than that amount, by the defense of usury, to a party having no previous notice of the usury, and without informing him of the usury, is a legal fraud, must be as clear as it is that it is a legal fraud to transfer to a purchaser in good faith, without notice, an account for an expressed amount which had never been incurred, or which had been paid. The usury is the act of the party selling. He does not own the sum forfeited by the usury, has no legal right to collect it, and therefore has no right to sell and transfer it to another. To that extent he has nothing to sell or transfer. The note, too, is his act, and by him therefore it is made to express what, in law, is a falsehood upon its face, and by this legal falsehood he induces another to believe what is not legally true, and to pay him money which he would not pay if he knew the legal truth. There is willful deception, in a legal aspect, and consequent gain, upon the one side, and, legally speaking, ignorant credulity, and pecuniary loss as its consequence, upon the other side: See Kerr on Fraud, Bump's ed., 42.

2. Where one party is liable to indemnify another against a particular loss, it is because, by law or by contract, the primary liability for such loss is upon the party indemnifying, and in such instances the party bound to indemnify is in privity with the party to be indemnified, and he therefore has a direct interest in defeating any suit whereby there may be a recovery as to the subject-matter of the indemnity against the party to be indemnified. The party to be indemnified, moreover, is manifestly directly interested in having him defeat all recovery in such suit, and so their respective interests and duties in respect of such suit must be the same. Rawle, in his work on covenants for title, 2d edition, page 242, after alluding to the ancient practice of "vouching to warranty," says: "Partly, perhaps, from analogy to that practice, it is well settled in this country, in most if not in all of the states, that in general, upon suit being brought upon a paramount

claim against one who is entitled to the benefit of a covenant of warranty, the latter can, by giving proper notice of this action to the party bound by that covenant, and requiring him to defend it, relieve himself from the burden of being obliged afterwards to prove, in the action on the covenant, the validity of the title of the adverse claimant." He then adds: "A similar course of decision has also been adopted in England, resting, however, rather upon general principles than any analogy to the old common-law practice of voucher."

In *Duffield v. Scott*, 3 Term Rep. 374 (6 Eng. Com. R., 1st ser., 208), Buller, J., speaking of this question, said: "The purpose of giving notice is not in order to give a ground of action, but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money."

In *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759, the court, per Bell, J., said: "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

In numerous other decisions, the general doctrine that notice, in such cases, to the party responsible over, imposes upon him the duty of defending, and renders him liable for the result of the suit, is asserted: *Blasdale v. Babcock*, 1 Johns. 516, *517; *Barney v. Dewey*, 6 Id. 224; 7 Am. Dec. 372; *Inhabitants of Milford v. Holbrook*, 9 Allen, 17; 85 Am. Dec. 735; *City of Boston v. Worthington*, 10 Gray, 496; *Pitkin v. Leavitt*, 13 Vt. 379; *Turner v. Goodrich*, 26 Id. 708; *Bond v. Goodrich*, 1 Nott & McC. 201; *Ryerson v. Chapman*, 66 Me. 563; see also *Wade on Notice*, sec. 180 c; *Freeman on Judgments*, sec. 181.

The only question, in this connection, upon which we find any diversity in the authorities, is, whether it is indispensable

that the indemnifying party should, in addition to having notice of the pendency of the litigation, be requested to take charge of it, and notified that if he fail, he shall be held responsible. That view is taken in *Sowers v. Schmidt*, 24 Wis. 417, and *Paul v. Whitmore*, 3 Watts & S. 410, and, it may be, also in other cases. But in our opinion, the weight of reason and of authority is the other way. An obligation to indemnify against the result of a particular suit necessarily assumes that, as between the party obligated to indemnify and the party to be indemnified, the entire burden of the suit should fall on the former, and that the latter should be entirely free of it, and therefore, that, as between them, the former, and not the latter, should be the real party to the suit, and prosecute or defend it. But since the latter may sue or be sued without the knowledge of the former, he might not know of the existence of the suit, and therefore could not prosecute or defend it, but if notified of the existence of the suit in apt time, he could prosecute or defend it, and it being his duty to do so, his failure to do so successfully would be conclusive against him that he was unable to do so, and that the judgment was right. In such case, the obligation to indemnify operates, from the making of the contract, as to every burden or loss within its contemplation; and although no suit could be maintained until after loss, the recovery would be, because it was the duty of the indemnifying party to have prevented loss, and it is absolute, and not conditioned upon request. We are unable to perceive why, in this case, more than in any other, a party shall have been requested to do that which it was his duty to do without request, or how a notice that he will be held responsible can be necessary, where he is, by contract, already legally responsible.

In *Blasdale v. Babcock*, *supra*, the action was for the price paid for a horse which the defendant had sold to the plaintiff, but which belonged to another person, who had recovered it from the plaintiff. The record of the judgment in favor of the owner of the horse, and against the plaintiff, was admitted in evidence as conclusive of the question of title. On objection to the competency of this evidence, it was insisted that it ought to appear, not only that the defendant had notice of that suit, but also that he had notice of the time when the cause was actually tried; but the court held that the first notice given to the defendant, of the pendency of that suit, was sufficient, and he was bound to know all the subsequent proceed-

ings, without a special notice of the time every court was to be held.

In *Barney v. Dewey*, *supra*, the declaration stated that the defendant, intending to deceive, etc., falsely represented a certain horse to be the property of the defendant, thereby inducing the plaintiff to purchase him; that the defendant well knew that the horse belonged to another person,—one Thaddeus Dewey,—and in an action brought against the plaintiff by T. Dewey, testified that the horse was the property of T. Dewey, and that he, the defendant, had no right to part with the horse. There was a demurrer to the declaration, which was overruled. The court, in considering the sufficiency of the declaration, said: "There is no allegation of notice to the defendant of the pendency of the suit brought by Thaddeus Dewey, but there is an averment of a fact tantamount. It is alleged that the defendant was a witness on that trial, and proved himself that he did not own the horse when he sold him to the plaintiff."

In *Beers v. Pinney*, 12 Wend. 309, in an action on a bond to indemnify special bail, it was held that notice, merely, of the pendency of the suit against the bail was sufficient to conclude the obligor in the indemnity bond. The court said: "The declaration avers that the plaintiff gave immediate notice to the defendants of the commencement of the suit against him, upon his recognizance, by Johnson, and of the nature and pendency thereof, and the proceedings therein. After such notice, they were bound to defend the suit."

In *City of Chicago v. Robbins*, 2 Black, 418, the city had been sued, and a recovery for damages had, because of a nuisance created and maintained by Robbins, in making and failing to properly guard an excavation in one of the streets of the city, and sought to recover back from Robbins the amount thus recovered from it. One of the questions discussed in argument and considered by the court was, whether Robbins had been sufficiently notified of the pendency of the suit against the city to be concluded by the judgment therein. The court said: "An express notice to him to defend the suit was not necessary in order to charge his liability: *Barney v. Dewey*, 13 Johns. 226; *Warner v. McGary*, 4 Vt. 500; *Beers v. Pinney*, 12 Wend. 309. He knew that the case was in court, was told of the day of trial, was applied to to assist in procuring testimony, and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could

contest Woodbury's right to recover, and that the city would look to him for indemnity." The same case was again before the supreme court of the United States as *Robbins v. City of Chicago*, and is reported in 4 Wall. 657. The sufficiency of the notice was again considered, and the foregoing ruling was reaffirmed. An instruction was there sustained, which told the jury that if the attorney of the corporation informed the defendant of the suit and its nature, and of the day of the trial, and conversed with him about the testimony for the defense, he was as much chargeable with notice as if he had been directly told that he could contest the right of the injured party to recover, and that the corporation would look to him for indemnity in case of an adverse result.

In *City of Boston v. Worthington*, 10 Gray, 496, the action was similar to that in *City of Chicago v. Robbins, supra*, and the question of notice to the party causing the nuisance, and hence bound to indemnify, was also there discussed and considered. The court said: "Had the defendants such notice of the pendency of Southwick's action as renders the judgment recovered therein conclusive against them to any extent? We are of opinion that they had. They were informed when Southwick's writ was returnable; that he had sued for an injury received on a day named, by a defect in the highway called Congress Square, in a place occupied by them. They were directed to take notice that the plaintiffs would hold those responsible who had the charge and custody of the place of the accident, and they were required to govern themselves accordingly. They were not, in terms, requested to take upon themselves the defense of that action; and this was not necessary in order to render the judgment conclusive against them as to the facts thereby established. . . . The defendants, by the notice given to them of Southwick's action, had an opportunity to defend it; and the case shows that they 'were present and at the trial, and testified therein.' This fact, according to Spencer, J., in 13 Johnson, *ubi supra*, is sufficient to show such notice as to render the judgment conclusive against them."

In *Holbrook v. Holbrook*, 15 Me. 12, the court said: "It cannot be material to the person agreeing to indemnify, that he should have a formal notice served upon him. The law requires that he should have notice before the judgment can be used against him, because he is the real party in interest. But any notice which will enable him to present any de-

fense which he may have, either in law or fact, is all that can be useful to him, and the law requires no vain or useless ceremonies in such cases." See also *Veazie v. Railroad Co.*, 49 Me. 119.

A recent case in point, also decided by the supreme court of Maine, is *Davis v. Smith*, 79 Me. 351. Suit was brought upon a bond given by the defendant to indemnify the plaintiff against loss on account of paying the plaintiff, who claimed to be a guardian, the amount of a promissory note given to another as guardian of the same person. The person to whom the note was given sued the plaintiff, and recovered a judgment for the amount due upon the note, which he paid. One of the material questions in the case was, whether the defendant had such notice of the pendency of the suit against the plaintiff that she was concluded by that judgment. The court said: "We are of the opinion, from the evidence before us, and with the inferences legitimately to be drawn from it, that the defendant had such notice of the pendency of the suit as renders the judgment recovered therein conclusive against her. She employed and paid the counsel who tried the case. She went, in company with the plaintiff, twice to Dover, to have the case tried, it being continued the first time because the other side was not ready. She was present at the trial, testified in the case, and paid all the expenses of this plaintiff and his witnesses. . . . The facts shown are sufficient to render the judgment conclusive against her, although the plaintiff had not in terms requested her to take upon herself the defense of that action. 'This was not necessary,' say the court in *Boston v. Worthington*, *supra*, 'to render the judgment conclusive against them as to the facts thereby established.' And this principle is established by the great weight of authority, that where one stands in the position of indemnitor to another who is liable over to a third party, his liability may be fixed and determined in the action brought against such third party, by notice of the pendency of such action, and an opportunity offered him to defend it. . . . In such case, the authorities hold that notice in writing, or even express notice, is unnecessary, but that notice may be implied from his knowledge of a pendency of the action, and a participation in the defense." See also *Ryerson v. Chapman*, 66 Me. 563; *Warner v. McGary*, 4 Vt. 508.

We are therefore of opinion that the circuit court erred in refusing the third, fourth, fifth, and sixth requests as asked by

the appellant, and that the appellate court erred in affirming that ruling.

Some point was made in argument that appellee was a mere broker, having no interest in the notes or bonds. No question arises upon the record in that respect. No question of that kind was raised in the trial court or considered in the appellate court. Although in fact a broker, unless the evidence showed that appellant knew him to be a broker, and dealt with him as such, he occupies the position of a principal.

No question was raised as to the good faith of the adjudication in the foreclosure case, either by requests to rule in that respect, or by objections to the introduction or exclusion of evidence. Of course, a decree by collusion would not be conclusive against the indemnitor, but there is nothing in that respect before us, as a question of law.

The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for a trial *de novo*, in conformity with the views hereinbefore expressed. Judgment will be entered in this court for the costs of the appellant in the appellate court, as well as in this court.

DUTIES AND LIABILITIES OF INDORSER WITHOUT RECOURSE. — IN GENERAL, the transferrer of a promissory note "without recourse" is exempt from the ordinary responsibilities of an indorser. Such an indorsement is a qualified one to the extent that the indorser cannot be held liable in a case of non-payment by the maker: *Watson v. Chesire*, 18 Iowa, 202; 87 Am. Dec. 380, and note 389; *Craft v. Fleming*, 46 Pa. St. 140; *Rayne v. Ditto*, 27 La. Ann. 622; *Waite v. Foster*, 33 Me. 424. The indorsement is merely a transfer of the property: *Id.*; or, as was said in *Miller v. Dugan*, 36 Iowa, 437, the obligations of a transferrer of paper without recourse are substantially those of a transferrer of paper when payable to bearer by delivery. But while the indorsement transfers the title to the note, it does not carry the right to maintain an action for fraud practiced upon such indorser in the transfer of the note to him by the payee: *Watson v. Chesire*, 18 Iowa, 202; 87 Am. Dec. 389; nor can the fact that a note was taken without recourse in any manner affect the rights of the indorsee against the maker: *Mayes v. Robinson*, 93 Mo. 114, 122.

WHAT WARRANTY IS IMPLIED. — An indorser without recourse impliedly warrants that the note is valid; that the signatures of the prior parties whose names appear thereon are genuine; that, so far as he is concerned, the paper expresses the exact legal obligations of all the parties that the note is of the kind or description it purports to be; that the note has not been paid; that the parties to it are *sui juris* capable of contracting; that he will do nothing to prevent the transferee from collecting it; that he himself has practiced no fraud in the transfer; that he will not defend that he was without title, or that the consideration was illegal. Such indorsement does away with the conditional liability which is assumed by an unqualified indorsement; but it leaves the indorser liable as vendor, and divests him of none of the liabilities

thereto attaching. "It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery": *Challiss v. McCrum*, 22 Kan. 157, 161; 31 Am. Rep. 181; *Hannum v. Richardson*, 48 Vt. 508; 21 Am. Rep. 152; *Watson v. Chesire*, 18 Iowa, 202; 87 Am. Dec. 382, and note 389; *Dumont v. Williamson*, 18 Ohio St. 515; 98 Am. Dec. 186; *Epler v. Funk*, 8 Pa. St. 468; *Rice v. Stearns*, 3 Mass. 225. In *Hecht v. Batcheller*, Mass. (not yet reported), the payees and owners of a promissory note received by them in the ordinary course of business sold it "without recourse," through a broker, to the plaintiffs in that suit. Two hours prior to the sale, the makers of the note made a voluntary assignment for the benefit of their creditors, which fact was not known at the time of the sale by any of the parties to the sale. A suit was thereafter brought by the holder of the note against the payee or seller thereof to recover the sum paid therefor; and the court said: "The offer of a note for sale without recourse to the seller does not involve any representation as to the solvency of the parties to it, or as to its value. . . . The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of sale, spoke of or inquired about or knew anything about the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the maker. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note; and we are of the opinion that no warranty could fairly be inferred, from the circumstances, of the solvency of the maker, or that they continued in business"; and recovery was denied.

PAROL EVIDENCE TO VARY CONTRACT OF INDORSEMENT. — As a general rule, oral evidence is inadmissible to change the contract of indorsement: *Barnard v. Gaston*, 23 Minn. 192; *Day v. Thompson*, 65 Ala. 269; *Preston v. Ellington*, 74 Id. 133; note to *Dewey v. Warriner*, 22 Am. Rep. 93; or to show an agreement that the indorser should not be held liable as such: *Courtney v. Hogan*, 93 Ill. 101. This rule, however, is not in force under some of the decisions to the full extent here given: *Ross v. Espy*, 66 Pa. St. 481; *Smith v. Morrill*, 54 Me. 48; *Mendenhall v. Davis*, 72 N. C. 150, and cases herein *post*. The general rule relates to restrictive indorsements, and extended, it applies to indorsements without recourse. Hence it has been held that an indorser may not, as against a subsequent *bona fide* indorsee for value, defend upon the ground that the words "without recourse" were verbally agreed between him and the indorsee's agent to be written over the indorsement, and that his indorsement was only made in view of such agreement, and for the sole purpose of transferring the title to that indorsee: *Lewis v. Dunlap*, 72 Mo. 174; *Hill v. Shields*, 81 N. C. 250, 254; *Commissioners of Iredell v. Watson*, 82 Id. 308; and other cases hold that parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement without recourse: Note to *Stack v. Beach*, 39 Am. Rep. 116; *Doolittle v. Ferry*, 20 Kan. 230; 27 Am. Rep. 166, citing 1 Daniel on Negotiable Instruments, sec. 719; 1 Greenl. Ev., sec. 276, note 2; *Lee v. Pile*, 37 Ind. 107; *Wilson v. Black*, 1 Blackf. 509; *Bartlett v. Lee*, 33 Ga. 491; *Woodward v. Foster*, 18 Gratt. 205; *Bank of Albion v. Smith*, 27 Barb. 489; *Fassin v. Hubbard*, 55 N. Y. 465; *United States Bank v. Dunn*, 6 Pet. 51; *Hove v. Merrill*, 5 Cush. 80; *Prescott Bank v. Caverly*, 7 Gray, 217; *Wright v. Morse*, 9 Id. 337; *Biglow v. Colton*, 13 Id. 310; *Goudy v. Harden*, 7 Taunt. 159; see also *Skinner v. Church*, 36 Iowa, 91; *Union Bank v. Crine*, 33 Fed. Rep. 809. *Dale v. Gear*, 38 Conn. 15; 9 Am. Rep. 353; and in *Charles v. Denis*, 42 Wis. 56, 24 Am. Rep. 333, the same rule was stated with a limitation to cases

where there was no fraud or mistake. But as to subsequent holders with notice, examine *Van Valkenburgh v. Stipplebeen*, 49 Barb. 99. In *Lee v. Pile*, 37 Ind. 107, the rule has been extended in its strictness, and it is there held that even between the immediate parties, it is no sufficient defense that there was an agreement that the note should be without recourse, and that parol evidence was inadmissible to show such agreement: See also *Smith v. Caro*, 9 Or. 278, and cases cited therein; *Mason v. Burton*, 54 Ill. 349; *Courtney v. Hogan*, 93 Id. 101. But *contra*, there are decisions which hold that parol evidence that the indorsement was merely made to transfer the title is admissible, and amounts to an indorsement without recourse, where the paper is held by the indorsee, and has not been put in circulation: *Davis v. Brown*, 94 U. S. 423; see also *Mendenhall v. Davis*, 72 N. C. 150; *Lewis v. Dunlap*, 72 Mo. 174; *Breneman v. Furness*, 90 Pa. St. 186; *Hill v. Shields*, 81 N. C. 250, 254; *Commissioners of Iredell v. Watson*, 82 Id. 308; *Lewis v. Williams*, 4 Bush, 678; *Harrison v. McKim*, 18 Iowa, 485; *James v. Smith*, 30 Id. 55; *Patten v. Pearson*, 57 Me. 428; *Smith v. Morrill*, 54 Id. 48; *Lynch v. Goldsmith*, 64 Ga. 42. So it may be shown that the indorsement was made to the agent of the indorser, or in trust for collection: *Lewis v. Dunlap*, 72 Mo. 174; *Donner v. Chesebrough*, 36 Conn. 39; and in *Moore v. Cross*, 19 N. Y. 227, it is held that a blank indorsement by the payee may be made to conform, even on trial, to an actual agreement to indorse without recourse, if the right so to indorse appears, the actual doing so being regarded as a matter of form.

PRICE v. DIME SAVINGS BANK.

[124 ILLINOIS, 317.]

DISCHARGE OF PROPERTY HELD AS COLLATERAL.—When a third person pledges his property as security for the payment of a debt or obligation of another, such property will stand in the position of a surety of the debtor, and any change in the contract of suretyship which will discharge a surety will release and discharge the property so held as collateral. This rule also applies to mortgages made by one person to secure the debt of another.

SURETY WILL BE DISCHARGED if creditor by valid and binding agreement without the assent of surety gives further time for payment to the principal debtor.

SURRENDER AND CANCELLATION OF OLD NOTES SECURED BY COLLATERAL IS SUFFICIENT CONSIDERATION FOR NEW NOTES, and the holder by such surrender and cancellation puts it out of his power to sue on the indebtedness or enforce its collection until the maturity of the new notes.

PRACTICE TO REMAND CAUSE GENERALLY is proper if decree is reversed for variance between the allegations of the bill and the proofs, or for any reason not going to the merits of the cause; otherwise, where upon the merits there can be no recovery.

F. P. Snyder, and Mayo and Widmer, for the appellants.

Allan C. Story, for the appellees.

SHOPE, J. There can be no question that the certificate of fifty shares of stock in the Dime Savings Bank was the prop-

erty of William K. Reed, and that Kelsey had notice of that fact when he accepted the same as collateral security for the payment of Henry C. Reed's note of November 30, 1872, in lieu of the Buehler note and mortgage. When a third person pledges his property as a security for the payment of a debt or obligation of another, such property will stand in the position of a surety of the debtor, and any change in the contract of suretyship which would discharge a surety will release and discharge the property so held as collateral. This rule also applies to mortgages made by one person to secure the debt of another: *Burnap v. National Bank of Potsdam*, 96 N. Y. 125; *Rowan v. Sharp Rifle Mfg. Co.*, 33 Conn. 18; *White v. Ault*, 19 Ga. 551; *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625; *Christner v. Brown*, 16 Iowa, 130; *Ryan v. Town of Shawneetown*, 14 Ill. 20; *Crawford v. Richeson*, 101 Id. 351; *Bank of Albion v. Burns*, 46 N. Y. 170; Colebrook on Collateral Securities, sec. 239.

The rule is well settled in this state, that if a creditor by a valid and binding agreement, without the assent of a surety, gives further time for payment to the principal debtor, the surety will be discharged: *Dodgson v. Henderson*, 113 Ill. 360; *Davis v. People*, 1 Gilm. 409; *Waters v. Simpson*, 2 Id. 570; *Crossman v. Wohlleben*, 90 Ill. 537; *Myers v. Bank*, 78 Id. 257; *Danforth v. Semple*, 73 Id. 170; *Montague v. Mitchell*, 28 Id. 481; *Kennedy v. Evans*, 31 Id. 258. See also Brandt on Suretyship, secs. 301, 304, 307; Bayliss on Sureties and Guarantors, 240 et seq.

The surrender of the old notes, and their cancellation, was a sufficient consideration for the new notes given, and the holder, by such surrender and cancellation, put it out of his power to sue on the indebtedness or enforce its collection until the maturity of the new notes. After the pledging of the certificate of the bank stock in October, 1874, as collateral security, Kelsey, the creditor, on December 1, 1876, had a settlement with Henry C. Reed, the debtor, on which it was found there was a balance of four thousand six hundred dollars due from the latter to the former upon the original indebtedness, and new notes, extending the time of payment for five years, were taken by Kelsey for such balance, and the note for the payment of which this collateral was pledged was canceled and surrendered. To this William K. Reed is not shown to have consented, or that he had any knowledge of it, or notice that his stock was pledged for the payment of the

new notes. It is not shown that he authorized Henry C. Reed or any one else to make such new pledge of his property. But if he had made or authorized the making of said pledge of his property in October, 1879, it appears that two years before the maturity of the last of these notes, Kelsey surrendered them to the maker, and again extended the time of payment to his debtor by accepting in lieu four other notes, the first for three hundred dollars, due on demand, and the other three for one thousand dollars each, due in one, two, and three years, respectively, from their date, the last of which did not fall due until in October, 1882. This material change in the terms of the contract, without the consent of William K. Reed, was sufficient to release the undertaking that his property should stand as security. As before said, the record fails to show that he had any knowledge of or assented to any of these extensions, or authorized Henry C. Reed or any other person to use his bank stock as a pledge for the performance of such new contract.

It is, however, urged that the pledge of the bank stock was made by William K. Reed on a valuable consideration moving from Henry C. Reed; that it was substituted for the Buehler note and mortgage of one thousand dollars, the property of Henry C. Reed, and therefore the bank stock is to be treated as the property of the latter; and therefore the various extensions given to him would not operate to release the collateral. It is true that if a debtor pledges collaterals of his own as security for his note or bill, the extension of the time of payment will not extinguish his creditor's lien on the collaterals. If Henry C. Reed owned the Buehler note and mortgage, and consented to its exchange for the bank stock, this rule might be invoked, and become decisive of the question being considered. Did he own such note and mortgage? In October, 1874, Kelsey held in his hands various collaterals to secure the payment of the Henry C. Reed note of \$7,331, among which was the Buehler note and mortgage for \$1,000, payable to Walter Lister, dated July 11, 1873, payable two years after the date thereof. This note was indorsed by Lister, and its payment guaranteed by him. The record fails to show how it came into the hands of Kelsey; but it is fairly inferable, from the evidence, that Henry C. Reed procured the note and mortgage from or through his brother, William K., and pledged the same to Kelsey. It appears, from the testimony of George W. Reed and that of L. B. Shattuck, that this note

and mortgage were, on February 2, 1874, taken by the Illinois Land and Loan Company in part payment of a debt due from Walter Lister, the payee, and that this company, on May 16, 1874, sold the same to the Dime Savings Bank, with which bank William K. Reed was connected, and of which he was an officer.

On August 2, 1874, as appears by the correspondence, Henry C. Reed requested William K. Reed to send to him (Henry) the mortgage he had spoken of, and two hundred dollars in money. That this was the Buehler mortgage is apparent from the letter of Henry C. Reed acknowledging its receipt, and the subsequent correspondence between William K. and Kelsey, and the letter of the latter to Henry C. Reed. William K. Reed wrote to Levi Kelsey, of the date of October 16, 1874: "Michael Buehler, whose note and mortgage you hold as collateral to H. C. Reed's agreement, wishes to take up his note of one thousand dollars, and have the mortgage released. I send you certificate No. 12 of the Dime Savings Bank for fifty shares stock belonging to me." This shows that its hypothecation was known to William K. Reed, and tends to strengthen the view that it had originally come from him to Kelsey. This letter was received by Kelsey; for, in his letter of October 17, 1874, to Henry C. Reed, he says: "Henry, I have just received a letter from William K. Reed, asking me to send him the last mortgage that you left with me, etc. William sends me fifty shares Dime Savings Bank, to hold in lieu of it. Shall I do it?" The note and mortgage were sent October 23, 1874, to William K. Reed, by Kelsey. It also appears from the note, duly proved, that it was paid to "William K. Reed, cashier," and that, on the same day of its payment, Buehler procured a loan on the same property from the Dime Savings Bank. The record nowhere shows that William K. Reed or the bank was ever called upon to account for the money received on this Buehler note and mortgage. If, as shown, this note and mortgage belonged to William K. Reed, no accounting would be expected; but if it belonged to Henry C. Reed, or to some other person, and had been accounted for, it could have in some way been made apparent.

It does not appear that Kelsey, when this note and mortgage were pledged to him, had notice that they belonged to William K. Reed. Henry C. Reed, being the holder and clothed with the evidence of ownership of said note and mortgage, and the same being indorsed in blank by the payee, Lister, might have

passed the title to the note to any innocent purchaser for value, and vested the title as against William K. Reed. This being so, Kelsey might properly take the same in pledge of Henry C. Reed as collateral security for his debt, and no extension of the time of payment, before notice of its being the property of William K. Reed, would have released it from the pledge. After notice that it belonged to William K. Reed, it was the duty of Kelsey, the pledgee, to do nothing prejudicial to the rights of William K. Reed as owner of such collateral. The letter of William K. Reed of October 16, 1874, to Kelsey, in which he sends the certificate of the bank stock, notified Kelsey that the shares of stock were the property of William K. Reed. By the same letter, Kelsey was requested to return the Buehler note and mortgage to him. Kelsey, acknowledging the receipt of that letter on October 23, 1874, says: "I received your letter last Saturday, and wrote to Henry about sending the mortgage to you," etc., and inclosed the note and mortgage, as requested. We think the correspondence, when considered in connection with the letter of Kelsey to Henry C. Reed, to know if he should return the same, was sufficient notice to Kelsey of the claim of William K. Reed to the note and mortgage. Whatever is sufficient to put a reasonably prudent man upon inquiry is to be regarded as notice of the facts such inquiry will disclose. Such inquiry, if made by Kelsey, clearly would have shown him that the note and mortgage belonged either to William K. Reed or to the bank, of which he was cashier. That Kelsey had notice of the ownership of the fifty shares of bank stock hypothecated in lieu of the Buehler note and mortgage, is clearly apparent. It cannot, therefore, be said that William K. Reed pledged his bank stock in consideration of the surrender to Henry C. Reed of the note and mortgage as his property. We have seen that the note and mortgage were not the property of Henry C. Reed, but that of William K. Reed, or of the bank, and if the latter, William K. Reed would be responsible to the bank for it. No consideration passed from Henry C. Reed for the exchange of collaterals, as neither belonged to him. It follows, therefore, that the certificate of bank stock pledged in lieu of the Buehler note and mortgage must be regarded as the property of William K. Reed, pledged as security for the payment of the note of Henry C. Reed made in 1872, and that the several extensions of the time of payment must be held to have discharged the pledgee's lien on the same.

It is insisted that the appellate court should have remanded the cause generally, so as that the complainant might have proceeded further in the court below. If the decree had been reversed for variance between the allegations of the bill and the proofs, or for any reason not going to the merits of the right of complainant to recover, the practice indicated would have been proper. But the proof showing that the lien on the collateral, in respect of which relief is sought by the bill, had been released, thereby defeating the complainant's right of relief, there was no reason for remanding the cause generally.

The views expressed render it unnecessary to consider the other question discussed by counsel. Perceiving no substantial error in the judgment of the appellate court, it must be affirmed.

SURETY IS BOUND IN THE MANNER AND TO THE EXTENT provided in the obligation executed by him, and no further: *First National Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453; *Simonson v. Grant*, 36 Minn. 439. It is not sufficient that he may not sustain injury by reason of a change in the contract of suretyship, for he is entitled to stand upon its exact terms, and any variation without his consent is fatal, and releases him from liability: *Simonson v. Grant*, 36 Id. 439; whatever that variation may be, whether by the giving of time to principal by obligee: *Place v. McIlwain*, 38 N. Y. 96; 97 Am. Dec. 777, and note; *State v. Roberts*, 68 Mo. 234; 30 Am. Rep. 788; *Hamilton v. Prouty*, 50 Wis. 592; 36 Am. Rep. 866; *Post v. Losey*, 111 Ind. 75; 60 Am. Rep. 677; or by an agreement by obligee with principal to forbear to sue for a certain fixed period: *Forbes v. Sheppard*, 98 N. C. 111; or by a change of employment from assistant book-keeper to note-teller by one upon whose bond a surety is obligated for the honest and faithful performance of principal's duties as clerk of the bank: *First National Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453; or by the substitution of a co-surety's name in an attachment bond, signed by a surety on condition that a certain other person, different from him who in fact did sign, should sign the bond as co-security: *Hessell v. Johnson*, 63 Mich. 623; 6 Am. St. Rep. 334; but mere indulgence by an obligee of the principal obligor will not discharge a surety; to work such a discharge, there must be an agreement, without the consent of the surety, for an extension or forbearance, entered into by and between the obligee or obligor: *Powers v. Silberstein*, 108 N. Y. 169.

SURETIES UPON A NOTE WHO HAVE BEEN INDUCED to believe for nearly five years that the note has been satisfied, and thereby deprived of opportunity for seeking indemnity, are released: *Brooking v. Farmers' Bank*, 83 Ky. 431.

WHEN OF TWO DEBTORS ONE IS SURETY FOR THE OTHER, and the common creditor has taken security from the principal debtor, he must give the surety the benefit of the security, either by payment or by subrogation; and creditor, by surrendering security without consent of surety, discharges surety *pro tanto*: *Otis v. Storch*, 15 R. I. 41.

LIABILITY OF SURETIES CANNOT BE EXTENDED BY IMPLICATION, because they have a right to stand upon the exact letter of their contract: *Henrie v. Brock*, 39 Kan. 381.

NOTE GIVEN AND ACCEPTED IN PLACE OF A FORMER NOTE OPERATES to extinguish it, together with all right of action thereupon: *Barrett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574.

PROPERTY OF SURETY HELD AS COLLATERAL SECURITY IS RELEASED from lien by any act which releases principal obligor: See *Denny v. Lyon*, 38 Pa. St. 98; 80 Am. Dec. 463; and where property is pledged by a stranger to indemnify a surety, not with an intention that it shall be applied in payment of the debt in order to relieve surety, it cannot be subjected by creditor; nor can even the surety subject such property until he has sustained or necessarily will sustain loss: *Macklin v. Northern Bank of Kentucky*, 83 Ky. 314.

DAVIES v. ATKINSON.

[124 ILLINOIS, 474.]

FUNDS MISAPPROPRIATED BY ONE PARTNER TO THE PAYMENT OF HIS INDIVIDUAL DEBTS may be recovered back, if needed for firm purposes, and if paid to a creditor who had knowledge of the misappropriation at the time he received payment, and the misappropriation was without the assent, express or implied, of the other members of the firm.

FUNDS OF A PARTNERSHIP MISAPPROPRIATED TO THE PAYMENT OF THE DEBTS OF A MEMBER OF THE FIRM, WITH THE ASSENT OF THE OTHER MEMBERS, cannot be recovered, unless the partnership is insolvent, and the moneys thus misappropriated are required to discharge its obligations.

LACHES. — It is unreasonable to delay nearly two years after knowledge of the misappropriation by a partner of the firm's money to the payment of his debts before bringing action for its recovery.

EVIDENCE. — IN ACTION TO RECOVER MONEY ON THE GROUND THAT IT WAS MISAPPROPRIATED BY A PARTNER TO THE PAYMENT OF HIS INDIVIDUAL DEBT, the plaintiff, before he can succeed, must prove that the moneys withdrawn by such partner were in excess of the sums which he was entitled to draw from the partnership on his individual account.

Smith and Pence, for the appellant.

William Garnett, Jr., H. S. Monroe, and Bisbee, Ahrens, and Decker, for the appellees.

MULKEY, J. On the twentieth day of July, 1880, the appellant, John T. Davies, of Liverpool, England, and the appellee, John A. Atkinson, of Chicago, Illinois, entered into a written agreement to become copartners together, under the firm name of Davies, Atkinson, & Co., "in the business of buying hogs and hog products, and curing, packing, and shipping the same to J. T. Davies & Co., of Liverpool, England, for sale, on account of the firm of Davies, Atkinson, &

Co., on commission"; also for buying provisions, on commission, for shipment to the continent of Europe and elsewhere. The partnership business was to be conducted at Chicago, where the same business had previously been carried on between Davies and Isaac Atkinson, the father of Atkinson, lately deceased. The business was to continue indefinitely, at the will of the parties, and until determined as in the agreement provided. By the third article of the agreement, it is provided as follows:—

"3. It is expressly agreed that during the existence of the said copartnership, the said John Arthur Atkinson shall draw from the said firm a sum not exceeding two thousand five hundred (\$2,500) dollars half-yearly, and that all sums so drawn by him shall be charged against his share of the profits in said concern. It is also agreed that during the existence of said copartnership the said Atkinson shall not buy, sell, speculate with or mortgage any firm assets, except as required in the ordinary copartnership business, and that the said Atkinson shall not engage in any speculations or business ventures on his own account, outside of the business of the said firm, and shall not sign or indorse any notes, bonds, or obligations for other parties, either as security or otherwise, or in any manner become surety for any person or persons whomsoever, without the consent of said John T. Davies."

The partnership continued from the date of the articles until the fourth day of October, 1884, when it was formally dissolved. The business during this time was conducted mainly under the personal supervision of Atkinson, the complainant being in Europe much of the time.

On the 21st of October, 1884, Davies filed in the superior court of Cook County the original bill in this case, making Atkinson alone defendant, charging him with gambling upon the Chicago Board of Trade, in violation of the articles of partnership, and with misappropriating the partnership funds to pay individual losses thus incurred, amounting in the aggregate to two hundred thousand dollars. The bill prayed for the appointment of a receiver, an accounting, and a settlement of the partnership affairs. The day after the filing of the bill, Atkinson entered his appearance and filed an answer, wherein it was admitted that he had speculated on the board of trade on his own account, and drawn checks on the partnership funds in payment of his individual losses, in favor of the various persons mentioned in the bill, to the amount of

\$27,012.50, but it is charged that those transactions were legitimate, and according to the custom and usages of the board of trade, and that the various checks drawn by him in payment of his losses were charged up to him on the partnership books. The checks in question were drawn in favor of and were paid to appellees other than Atkinson.

On the 23d of October the court made an order appointing Robert Y. Hobden receiver, who made an inventory of the visible assets of the firm, which amounted in value to \$45,006.45, and were subsequently sold by him for that sum. On the same day Davies brought an action of account against Atkinson, on the law side of the court, respecting the same partnership dealings involved in the chancery suit. On the 26th of January, 1885, the court, on the application of the complainant, entered an order in the chancery suit, staying the same so far as it sought an accounting, leaving that matter to be settled in the action at law. The suit was continued, however, for the purpose of collecting and disbursing the assets among the creditors of the firm. On the 15th of May, 1886, the complainant filed an amended supplemental bill, making the present appellees defendants thereto, wherein it is sought to charge them as payees and recipients of the proceeds of the checks drawn by Atkinson on the partnership funds to pay his individual losses on the board of trade, as heretofore stated. Three days after the filing of this bill, Davies and Atkinson, without any account having ever been taken showing the state of the account between themselves respecting their partnership dealings, came to a settlement as between themselves, whereby Davies acquitted and discharged Atkinson of all liability to himself on account of or growing out of the copartnership, but reserved the right to make whatever he could out of any other persons that might, on any account or in any manner, be liable to the firm.

The appellees other than Atkinson answered the amended supplemental bill, denying the equities thereof, and alleging that Davies had knowledge of the manner in which Atkinson conducted the business of the firm; that he knew that Atkinson kept no individual bank account; that he was speculating on the Board of Trade, and paid losses by checks on the partnership funds, as is admitted to have been done. It was further answered that there had been a compromise and full settlement between Atkinson and complainant, by which the former was released and discharged from accounting to Davies

respecting their partnership dealings, and from all liability on account of the firm debts, as above stated.

On the hearing, the superior court found the equities with the defendants, and entered a decree dismissing the bill, which, on appeal, was affirmed by the appellate court, whence the record is brought here for review.

While we think the general theory upon which the amended bill was drawn is, as matter of law, correct, and that such a bill, under certain circumstances, might well be maintained, yet we are clearly of opinion that the evidence fails to sustain the present bill. The principle is well recognized, that where the individual creditor of a partner knowingly receives payment of his claim out of the partnership funds, it is, *per se*, a misappropriation of the assets of the firm to that extent, and it may be recovered back to answer partnership purposes. But it is equally clear that where such payment is made with the consent, express or implied, of the other partners, the latter would have no right to recover the money back to satisfy any demand they might have against the firm. And even conceding it might be recovered in their names, or in the name of the firm, for the use of the firm creditors, it is manifest that a suit in equity could not be maintained for such purpose without showing the insolvency of the firm, and that the money sought to be recovered was necessary for the payment of firm debts.

We think, outside of the positive testimony of Atkinson to that effect, that all the circumstances tend strongly to show that Davies knew how the business of the firm was being conducted, and the manner in which the books were kept. The amount of the checks in question was all charged up to Atkinson on his individual account, and it would be taxing credulity beyond all reason to suppose a successful, active business man like Davies would have allowed that system of business to go on for four years without knowing something about it. It is true, Davies swears that he knew nothing about it until the time of the dissolution, in 1884; yet the weight of the evidence is against him on this question. But suppose he is right in this matter; we are, on other grounds, still of the opinion the law is with the appellees. Conceding appellant knew nothing about Atkinson's misappropriation of the partnership funds at the time it was going on, and learned of it first about the time of the dissolution, what was his duty if it were his intention to hold appellees responsible for the proceeds of the

checks in question? Unquestionably he should have notified them of such intention, so that they could have taken immediate steps to save themselves out of any individual estate that Atkinson might then have had. But this was not done. Instead of telling them what they might expect, he remained silent from the 4th of October, 1884 (the date of dissolution), till the 15th of May, 1886. Four days after this, upon the settlement between Atkinson and Davies, as heretofore stated, Atkinson and wife released and conveyed to Davies all their interest in the estate of Isaac Atkinson, deceased. As there never was any investigation as to how the actual account stood between these parties, it is not positively certain but what, as between themselves, Atkinson was entitled to the full amount of money drawn out on the checks; yet the probability is, of course, the other way. In any event, we think appellant's delay in proceeding against the appellees, even upon his own statements, was unreasonable.

Outside of all this, it is an undisputed fact, shown by the articles of partnership themselves, that Atkinson was authorized to draw upon the partnership funds, on his individual account, to the extent of five thousand dollars per annum, which, for the period covered by the partnership, amounted to over twenty thousand dollars. This, taken in connection with the further fact that whenever Atkinson made anything in his speculations on the Board of Trade, which he swears frequently occurred, he turned it into the partnership fund, and credited himself with the amount, so that it is not clear but what these sums, when added to the amount he was authorized to draw out, will fully cover the checks in question. Be this as it may, we are clearly of opinion that the evidence fails to make out such a case as warranted the relief sought.

Being fully satisfied with the conclusion reached by the lower courts, the judgment of the appellate court will be affirmed.

MISAPPLICATION BY PARTNER OF PARTNERSHIP PROPERTY IN PAYMENT OF INDIVIDUAL DEBT. — "The rule seems to be well settled that the authority of each partner to dispose of partnership property extends only to the business and transactions of the partnership, and any disposition of the property beyond such purposes, without the consent of the copartner, is an excess of authority": *Liberty Savings Bank v. Campbell*, 75 Va. 534, 539. For this reason a partner cannot divert property belonging to the firm to his own use: *Carter Bros. v. Galloway*, 36 La. Ann. 730. Especially is this so where the firm assets are needed to liquidate the partnership debts: *Hyrschfelder v. Keyser*, 59 Ala. 338.

THE GENERAL RULE, then, as deduced from the above propositions, — and this rule is settled beyond controversy, — is, that a partner may not use the firm assets, or make a valid transfer of its property, in payment of his private or individual debts, or pledge the same for that purpose: *Liberty Savings Bank v. Campbell*, 75 Va. 534; *Hartley v. White*, 94 Pa. St. 31, 36; *Allen v. Cary*, 33 La. Ann. 1455; *Forney v. Adams*, 74 Mo. 138; *Atkin v. Berry*, 1 Lea, 91; *Stegall v. Coney*, 49 Miss. 761; *Thomas v. Penrich*, 28 Ohio St. 55, 60; *Ackley v. Stachlin*, 56 Mo. 558; *McNair v. Platt*, 46 Ill. 211; *Caldwell v. Scott*, 54 N. H. 414; *Pierce v. Pass*, 1 Port. 232; *Filley v. Phelps*, 18 Conn. 294; *Burwell v. Springfield*, 15 Ala. 273; *Nall v. McIntyre*, 31 Id. 532; *Norment v. Johnston*, 10 Ired. 89; *Hyrschfelder v. Keyser*, 59 Ala. 338. Nor may a partner set off a private account against a debt due the firm: *Pierce v. Pass*, 1 Port. 232; *Cotzhausen v. Judd*, 43 Wis. 213; 28 Am. Rep. 539; nor even to retain the debtor's custom for the partnership: *Id.*; nor may he settle a private debt with the firm's note: *Howell v. Sewing Machine Co.*, 12 Neb. 177. Nor can partnership realty be mortgaged by one of the firm to satisfy an individual debt, or at least not beyond such partner's share after the partnership debts are paid and the firm's accounts settled: *Conant v. Frary*, 49 Ind. 53. In none of these cases, subject to the exception noted below, is the title divested out of the firm: *Liberty Savings Bank v. Campbell*, 75 Va. 534, 539, and cases herein *post*. The principle which governs in this class of cases, and makes such payment not binding upon the firm, is that already noted; viz., that a partner's authority is limited to those things done in the regular firm business, or those which he is expressly or impliedly legally authorized to do: *Stegall v. Coney*, 49 Miss. 761; *McNair v. Platt*, 46 Ill. 211.

EXCEPTION TO THE GENERAL RULE. — Such payment of a private debt may be authorized by the express or implied assent of the copartner, or by his subsequent ratification of the act, in which case the copartner so assenting necessarily loses whatever remedy he might otherwise have had: *Carter v. Beaman*, 6 Jones, 44; *Conant v. Frary*, 49 Ind. 530; *Hartley v. White*, 94 Pa. St. 31, 36; *Cotzhausen v. Judd*, 43 Wis. 213; 28 Am. Rep. 539; *Sexton v. Anderson*, Mo. (not yet reported); *Pierce v. Pass*, 1 Port. 232; *McNair v. Platt*, 46 Ill. 211; *Todd v. Lorah*, 75 Pa. St. 155; *Caldwell v. Scott*, 54 N. H. 414; *Atkin v. Berry*, 1 Lea, 91; *Howell v. Sewing Machine Co.*, 12 Neb. 177.

FRAUDULENT CHARACTER OF SUCH PAYMENT. — "He who knows that the partner's act is not within the firm business knows that it is not authorized, and when he knows that the partner is acting for his own immediate and several benefit, he cannot presume that the firm authorizes it: *Parsons on Partnership*, 228. A party taking the paper of a firm, with the knowledge that it was given for the private or personal debt of one of the partners, knows enough to put him on his guard, and is bound to inquire whether the firm authorized the use of its name: *Id.* 121. The principle applies to the property of a firm equally as to its paper": *Carter Bros. v. Galloway*, 36 La. Ann. 730; *Allen v. Carey*, 33 Id. 1455, 1459. It is therefore held in many cases that such application of the firm proceeds is a fraud upon the copartnership: *Allen v. Carey*, 33 Id. 1455; *Mix v. Muzzy*, 28 Conn. 186; *Yale v. Yale*, 13 Id. 185; *Filley v. Phelps*, 18 Id. 294; *Stegall v. Coney*, 49 Miss. 761, 769; *Mutual Nat. Bank v. Richardson*, 33 La. Ann. 1312, 1316; *Caldwell v. Scott*, 54 N. H. 414. Some of the cases, however, only go so far as to decide that where the creditor knows the debt to have been liquidated by firm property, then it is presumptively fraudulent: *Johnson v. Chrichton*, 56 Md. 108; or hold that it is a purchaser's knowledge which vitiates his

title: *Stegall v. Coney*, 49 Miss. 761, 769; *Carter Bros. v. Galloway*, 36 La. Ann. 730. Other cases decide that the title is not divested, even though the creditor did not know that the money or property received by him in settlement of a private debt was partnership property: *Liberty Savings Bank v. Campbell*, 75 Va. 534, 539; *Caldwell v. Scott*, 54 N. H. 414. In *Calkins v. Smith*, 48 N. Y. 614, 8 Am. Rep. 575, a partner made his promissory note, and indorsed it in the firm name without his copartner's knowledge or consent, in payment of an individual debt due defendant, who took the note with knowledge of the facts, and in order to bind the firm, indorsed it, before maturity, to a *bona fide* holder for value; the note was paid out of the firm assets, and it was determined that the defendant was guilty of a fraud for which he was liable in damages, but that the fraud was not upon the firm, but upon the individual partners who did not consent to the indorsement of the note. So it is held in *Clarke v. Farrell*, Ga. (not yet reported), that a creditor with knowledge or with reasonable ground of suspicion that there is a misapplication of the firm property is not an innocent holder or purchaser, under section 1913 of the Georgia Code; and knowledge of the fact that the partnership funds were used may be implied from the fact that a draft was made upon the copartner through a bank which had knowledge that the partnership funds were used in liquidating the debt: *Davis v. Smith*, 27 Minn. 390.

THAT THERE WAS ACTUAL OR PRESUMPTIVE FRAUD MAY BE DISPROVED. — The presumption of fraud which arises against an individual creditor whose debt has been so liquidated by the firm's money, with his knowledge of the fact, may be rebutted by showing that the other members of the firm knew of and consented to such payment: *Johnson v. Crichton*, 56 Ind. 108; "and this may be inferred from the usual mode or course of conducting the business, or the special circumstances of the case, if sufficient to raise a fair and reasonable implication of such authority. The burden of proof, however, is upon the party dealing with the partner in respect to their separate affairs to show circumstances sufficient to repel every presumption of fraud, collusion, misconduct, or negligence on his part as against the partnership; and if he fail in this, the transaction by which the funds or securities or effects of the partnership have been obtained will be treated as a nullity": *Id.* 113. So where a partnership has so intrusted one partner with the partnership goods that he is enabled to deal with them as apparently his own, and to induce the public to believe them to be his, a sale by him of such goods in payment of his private debt, to one who has no knowledge or notice that they are partnership goods, is valid as against the partnership and its creditors: *Locke v. Lewis*, 124 Mass. 1; 26 Am. Rep. 631. Assent may be shown by facts from which it may be implied, as that it was the custom of the copartners to use firm money to pay private debts and charge the same to themselves on the partnership books, and such evidence is proper and legitimate to repel the presumption of fraud arising from such application of the funds; and payment by the copartner of a firm debt to such creditor thereafter created is competent to show assent: *Carter v. Beaman*, 6 Jones, 44. Consent may also be inferred where the copartner knows of the misappropriation, and being bound to speak remains silent; but mere knowledge of itself is insufficient to bind the copartner: *Todd v. Lorah*, 75 Pa. St. 155. Where a creditor has knowledge of the fact, either expressly or impliedly, the burden is then upon him to show that the partner had authority to use the firm property for the payment of his private debt: *Davis v. Smith*, 27 Minn. 390; *McNair v. Platt*, 46 Ill. 211; *Carter Bros. v. Galloway*, 36 La. Ann. 730; *Me-*

chanics' etc. Ins. Co. v. Richardson, 33 La. Ann. 1308. But the fact that the partner states his copartner's consent does not aid the creditor: *Allen v. Carey*, 33 Id. 1455, 1460; nor does the mere fact that the copartner did not object to the appropriation affect the creditor's liability to the firm: *Currier v. Bates*, 62 Iowa, 527.

MONEY SO PAID MAY BE RECOVERED BACK. — Where a creditor of one partner receives money or property in pledge or payment of his debt, he thereby becomes a debtor of the partnership for the money or the price of the property, and it may be recovered back by the partnership: *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293, and note 297; *Forney v. Adams*, 74 Mo. 138; *Viles v. Bangs*, 36 Wis. 131; *Burwell v. Springfield*, 15 Ala. 273; *Nall v. McIntyre*, 31 Id. 532; *Moriarty v. Bailey*, 46 Conn. 592; *Clarke v. Farrell*, Ga. (not yet reported); *Johnson v. Crichton*, 56 Md. 108; and a claim set off against such separate debt of a partner may be sued on by the firm: *Dob v. Halsey*, 16 Johns. 34; 8 Am. Dec. 293, and note 297; *Cotzhausen v. Judd*, 43 Wis. 213; and where the debt is paid by a transfer of the partnership goods, such transfer may be treated as a sale: *Forney v. Adams*, 74 Mo. 138; and a firm creditor may sue for and collect money so wrongfully applied: Id. 138; *Johnson v. Hersey*, 70 Me. 74; 35 Am. Rep. 303, and note 306; and the assignee of a firm may recover money or property so misapplied: *Thomas v. Penrich*, 28 Ohio St. 55. So where a partner in an insolvent firm sold his interest to his copartner, who assumed the firm debts, and the latter deeded all the firm property to secure a debt of his own accruing previous to the dissolution, it was decided that a creditor of the firm was entitled to payment out of such property before the individual creditor, and that as to the firm creditor such deed was void: *Phelps v. McNeely*, 66 Mo. 554; 27 Am. Rep. 378. See also *Hartley v. White*, 94 Pa. St. 31; *Johnson v. Crichton*, 56 Md. 108. But where by agreement with the creditor of a firm his indebtedness has been paid by a set-off of an individual debt of one of the partners and with his assent, and the creditor acts in good faith, the amount so set off cannot be recovered back by the copartners in an action at law: *Chase v. Bean*, 58 N. H. 183, citing *Homer v. Wood*, 11 Cush. 62; *Williams v. Brimhall*, 13 Gray, 462; *Fay v. Ladd*, 15 Gray, 296; *Greeley v. Wyeth*, 10 N. H. 15.

DEFENSES. — The assent or ratification of the copartner is a bar to recovery back of the money so misapplied, or to a suit for the price of property so wrongfully appropriated: *Carter v. Beaman*, 6 Jones, 44. Some of the cases seem to imply that knowledge of the creditor that the money so paid or the property so applied was partnership money or property is material: *Forney v. Adams*, 74 Mo. 138, and cases *ante*. But knowledge that the firm property was used is not an essential ingredient in the case. The only question is, Has the title passed to the individual creditor? And if it has not it may be recovered back: *Ackley v. Stachlin*, 56 Mo. 558, 562; *Moriarty v. Bailey*, 46 Conn. 592. In this last case it was said, however: "That the money may be recovered by the firm, although the creditor did not know that the funds belonged to the partnership, seems to be a well-settled general rule. . . . This rule, though laid down in the text-books without qualification, yet seems to us to require some restriction for the protection of a private creditor who in good faith, and with no circumstances to put him on inquiry, receives partnership funds in payment of his debt, and discharges security held by him therefor, and if compelled to refund the money so received could not be restored to the situation he was in before payment."

McDOWELL v. CHICAGO STEEL WORKS.

[124 ILLINOIS, 491.]

SALE OF PLEDGED PROPERTY — NOTICE. — At common law the pledgee had no right to sell the property pledged without judicial process, unless he gave the pledgor reasonable notice to redeem, and the pledgor was also entitled to notice of the pledgee's intention to sell, and of the time and place of sale.

NOTICE OF SALE OF PLEDGED PROPERTY IS NOT NECESSARY where payment is demanded of the pledgor, and the instrument in writing, by which the security pledged is assigned and transferred to the pledgee, specially authorizes the latter to sell "at public or private sale at his discretion," upon default being made, or upon the expiration of a certain number of days after default; and this rule applies to stock so pledged as collateral.

LACHES — ESTOPPEL. — Where party allows a sale of pledged stock to stand for six years after it was made, this constitutes such serious laches as to preclude a recovery; and where in addition he received from the company the difference between the real value of the stock and what it sold for, and sued in trover after demand and failure to obtain it for his stock note as having been satisfied by sale of the stock, he is estopped from claiming the sale to be void.

AGREEMENT AS TO PAYMENT OF STOCK BY CREDITING WITH DIVIDENDS, EVEN IF VALID, IS RESCINDED BY THE SUBSEQUENT GIVING OF A STOCK NOTE therefor, and the collection of such note cannot be defeated by the agreement.

Thomas Dent and J. H. Raymond, for the appellant.

Stiles and Lewis, for the appellees.

MAGRUDER, J. On July 27, 1876, the appellant signed and delivered to the Chicago Steel Works the following stock note:—

"Whereas, the undersigned did, in the month of September, 1873, subscribe for fifty shares of one hundred dollars each of the capital stock of the Chicago Steel Works (an incorporated body organized under the laws of the state of Illinois), upon which subscription no payment has yet been made:—

"Now, therefore, I, Malcolm McDowell, do hereby agree and promise, in consideration of the premises, to pay to the said Chicago Steel Works, whenever payment may be demanded by the directors thereof, the sum of five thousand dollars (being the par value of said stock), with interest on the same at the rate of ten (10) per cent per annum from the first day of January, A. D. 1874, payable annually, until this obligation is paid; and to further secure said payment, I do hereby assign and transfer to the treasurer of said Chicago Steel Works, and his successor or successors in office, all my right, title, and interest of and in and to said stock so subscribed for, with any

its improvements and increase as collateral security for the payment of said indebtedness when demanded, as above provided; and in case of default in payment when so demanded, I do hereby authorize and empower the said treasurer to sell my right, title, and interest in said stock so subscribed for, with any its improvements and increase, or so much as may be necessary to pay this obligation, at public or private sale, at his discretion, after the expiration of thirty days after such default, and in case of any such sale, I do hereby empower him, the said treasurer, or his successors in office, of said corporation, or any other officer of said corporation, to make, execute, and deliver to the purchaser or purchasers at any such sale, any and all instruments in writing, or assurances or certificates of stock, which may be necessary or proper to vest in or evidence to such purchaser or purchasers the full ownership and title to the right and interest so to be sold to him or them.

"In testimony whereof, I have hereunto set my hand this twenty-seventh day of July, A. D. 1876."

On December 13, 1879, the board of directors passed a resolution calling for payment of the stock notes on January 15, 1880. Notice of this resolution was at once served upon appellant, and demand was made of him to pay his note on January 15, 1880. On December 17, 1879, appellant filed his bill in the superior court of Cook County, enjoining the sale under the provisions of the note. January 17, 1880, the Chicago Steel Works stipulated in writing that it would not attempt to make any sale under the resolution of December 13, 1879, or the notice given in pursuance thereof, but expressly reserved the right to sell the stock interest of appellant under such methods or proceedings as might be thereafter adopted. The bill so filed was demurred to on January 30, 1880, and on March 24, 1880, the demurrer was sustained, and the bill dismissed.

On April 6, 1880, the directors passed another resolution, that the stock notes be declared due on April 15, 1880, and that the secretary of the company be directed to give the necessary notice and make the necessary demand for the payment of the same into the hands of the treasurer on or before April 15, 1880. On April 7, 1880, a written notice was served upon the appellant, which contained an exact copy of the resolution of the day before, and demanded of the appellant that he pay his stock note and the accumulated interest thereon on or before April 15, 1880. The notice also called attention to

the fact that a meeting of the stockholders would be held on April 13, 1880, to elect directors.

Appellant failed to pay his note, and on May 17, 1880, the board of directors passed a resolution, in which, after reciting the former resolution of April 6, 1880, and that notice had been given to appellant, and demand made of him, as therein directed, and that his default had continued for more than thirty days, it was resolved that the treasurer be authorized and requested to sell all the right, title, and interest of appellant in the stock so subscribed for by him at public sale to the highest bidder, at such time and place as the treasurer might select, and to deliver to the purchaser a stock certificate, etc.

On May 22, 1880, at ten o'clock in the forenoon, the fifty shares of stock subscribed for by appellant, and all his interest in and under his subscription, were sold at public auction at the north door of the Chamber of Commerce, on Washington Street, in the city of Chicago, to Clarence Buckingham, for five thousand dollars, which amount was applied on the note. Previous notice of the sale had been given by the publication thereof for three days in a Chicago daily newspaper.

The original bill in the case at bar was filed in the superior court of Cook County on November 19, 1884; it does not attack or even mention the sale of May 22, 1880; it sets up the organization of the corporation above named for the purpose of making plow-beams out of the fag ends or refuse of steel rails, with a nominal capital of twenty thousand dollars, and that appellant, Catherinus P. Buckingham, Ebenezer Buckingham, and John Buckingham each subscribed for one fourth, or five thousand dollars, of the stock; it alleges that, in forming the corporation, an agreement was made for the payment of the stock subscriptions out of the profits of the business; that the Buckinghams furnished the capital, and charged interest on their loans to the company, etc.; it charges that the Buckinghams and the company entered into a conspiracy to oust appellant from the corporation, and in pursuance thereof induced him to execute the note above set forth, etc.; it prays for a discovery and accounting; for the issue to appellant of the stock subscribed for by him, or if issued to others, for its surrender; for an injunction against any transfers, reissues, or increase of the stock, and against the making of any erasures or entries in the books of the company, etc.

On December 20, 1884, the company and the Buckinghams, defendants, answered the bill, denying its allegations, and set-

ting up the sale of May 22, 1880, and the proceedings leading up to it, as hereinbefore detailed. On April 2, 1886, appellant filed an amendment to his bill, and therein, for the first time, referred to the sale of May 22, 1880, and charged that it was made without notice to him, and was a fraud upon his rights, and an attempt to forfeit his stock, etc.

After proofs taken and upon hearing of the cause, the superior court dismissed the bill for want of equity, which decree has been affirmed by the appellate court, whence the case comes before us by appeal.

The sale of May 22, 1880, is attacked by the appellant as void for the alleged reason that it could not be lawfully made without notice to him, and that such notice was not given. At common law the pledgee had no right to sell the property pledged without judicial process, unless he gave the pledgor reasonable notice to redeem; and the pledgor was also entitled to notice of the pledgee's intention to sell and of the time and place of sale. Such notice, however, is not necessary where, as in the present case, payment is demanded of the pledgor, and the instrument of writing, by which the security pledged is assigned and transferred to the pledgee, specially authorizes the latter to sell "at public or private sale at his discretion," upon default being made, or upon the expiration of a certain number of days after default: *Cushman v. Hayes*, 46 Ill. 145; *Loomis v. Stave*, 72 Id. 623; *Union Trust Co. v. Rigdon*, 93 Id. 458; *Jones on Pledges*, sec. 611; *Story on Bailments*, sec. 317; *Midiken v. Dehon*, 27 N. Y. 364; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Bryson v. Raynor*, 25 Md. 424; 90 Am. Dec. 69; *Genet v. Howland*, 45 Barb. 560; *Murdock v. Columbus Ins. Co.*, 59 Miss. 152; *Mowry v. Wood*, 12 Wis. 413.

At common law, where property is pledged to secure a debt, the right to sell for default in payment is conferred by the law, and hence the sale must be made subject to the conditions imposed by the law, that is to say, after making demand and giving notice. But where the pledge is accompanied by a special contract as to sale upon non-payment of the debt, the right to sell is conferred, not by the law, but by the contract itself, and hence must be exercised in the mode specified by the parties in their agreement. As such contract embodies the intentions of the parties, its silence as to notice justifies the inference that the power to sell without notice was intended to be conferred.

We are aware that in *Rozet v. McClellan*, 48 Ill. 345, 95 Am.

Dec. 551, language was used which seems to imply that the pledgor must have notice even where the pledgee is authorized to sell the collateral security at public or private sale. But such language was unnecessary to the decision of that case, and was mere *obiter dictum*. There no sale had been made of the stock pledged as collateral security, and the question of the power to sell without notice did not arise. In that case suit was brought upon the note, and the question was whether the holder of the note was bound to sell the stock, transferred to him as collateral security, upon default in payment of the note, and, on failing to do so, whether he was liable to account for the loss.

Here appellant promised to pay five thousand dollars to the company when payment should be demanded by the directors. They demanded payment of him in December, 1879, but he refused to comply with the demand, and postponed the threatened sale under the power in the note by a chancery suit, which lasted until the end of March, 1880. In that suit he was notified by the company that it reserved its right to make sale of his stock interest under a future notice, and was thereby forewarned and notified of the intention of the company to sell in pursuance of the authority conferred by the note. He made the note, and was bound to know that if his default continued for thirty days after demand, the treasurer was authorized to sell. When, therefore, a second demand was made on him for the payment of his subscription, in April, 1880, it was his duty to take notice that in thirty days after April 15, 1880, his interest would be sold at public or private sale if he did not pay. By an instrument in writing he transferred and assigned his interest to the treasurer of the company, and authorized him, in case of default for thirty days, "to sell at public or private sale at his discretion." If, in the exercise of such discretion, the treasurer had made a private sale, notice to appellant of the time and place of such sale would not only have been unnecessary, but would have been an idle form. The power to make a private sale necessarily dispensed with the duty of giving notice, and the obligation of giving notice was equally removed when the discretion of making the sale either public or private was conferred upon the treasurer. The sale, however, was a public one, made at a public place, and after due advertisement in a public newspaper.

We do not think it would be a fair construction of the con-

tract to hold that it was intended to require the company to give appellant personal notice in case the sale should be public, but no notice in case it should be private. Where property was pledged to secure a debt without any special contract as to notice, the pledgor was entitled to notice of the time and place of the sale, to enable him to procure buyers and enhance the price. But the appellant yielded his rights in this regard when he bestowed the discretion to make a private sale, because such sale might be made at a price fixed in advance by the company, and without competition among bidders.

The appellant has furthermore been guilty of serious laches in allowing the sale to stand without attack for so many years, and after his interest had been transferred by the purchaser at the sale, and gone into the hands of third parties: *Hayward v. National Bank*, 96 U. S. 611. He took no measures to set aside the sale until April, 1886, six years after it was made. To be sure, he filed the original bill in this case four years and a half after the sale; but even if that period was not a long delay, such original bill did not question the validity of the sale, but sought relief on other grounds. On the other hand, appellant has done acts which ought to estop him from now claiming the sale to be void. For instance, he accepted from the company a sum of money, which represented their estimate of the difference between the real value of his stock interest and what it sold for. Again, he wrote the company a letter, saying: "Please send me my stock note, which I understand has been satisfied," etc.; and upon failing to get his canceled note, commenced a suit in trover for it.

Appellant claims, however, that there was an agreement made between himself and the Buckinghams before the organization of the company, by the terms of which the subscriptions to the capital stock were not to be paid in money, but out of the profits of the business; and, as confirming his statement in regard to such an agreement, he points to section 9 of the by-laws, adopted at a meeting of the board of directors on September 29, 1873, which provided that a capital-stock account should be kept, and that therein the subscribers should be charged with their stock liability, and credited with dividends, etc. His position is, that if he had been properly credited with his share of the profits, his liability on his stock subscription would have been discharged.

We will not stop to discuss whether such an agreement, if it existed, was not against public policy, and contrary to the

statute which requires stock to be paid for, nor whether it was abrogated by the language of the stock subscription, which reads as follows: "We severally agree to pay the said company the sum of one hundred dollars on each share, at such times and in such installments as shall be required by the board of directors of said company." It is sufficient to say, that even if such an agreement were valid, its existence is not proven by such a preponderance of the evidence as would justify its being made the basis of affirmative relief. The proof of it consists entirely of the testimony of the appellant himself, while both C. P. and Ebenezer Buckingham deny that there was any such agreement. There may have been, and probably was, some talk to the effect that the business would be so profitable as to earn enough to pay for the stock. Moreover, the proof does not show that in the early part of 1880 the profits were sufficient to pay the stock notes without doing injustice to the creditors by such an application of the surplus. The other subscribers paid their stock notes in money, with the exception of a small credit thereon arising from the proceeds of dividends declared in their favor.

On July 1, 1876, a dividend of fifteen per cent, or \$750, and on January 1, 1878, another dividend of ten per cent, or \$500, were declared in appellant's favor. These sums, however, he did not suffer to remain in the hands of the company to be applied on his note, but drew them out, and used them for other purposes.

But even if there was such an agreement as is contended for, it was rescinded by the proceedings which took place on July 27, 1876. On that day, there was a meeting of the directors, at which appellant was present. Section 9 of the by-laws was repealed, and appellant assented to the repeal. A resolution was adopted that each of the subscribers to the capital stock should give such a stock note as that hereinbefore discussed. The resolution was read over to appellant, and agreed to by him, and in pursuance thereof he executed his note with the provisions above stated. The proof does not show that any fraud or unfair means were used to induce him to sign the note. By its terms, he agreed to pay the five thousand dollars and interest whenever demand should be made on him by the directors, and without limiting his obligation to pay such amounts as might be coming to him from the profits of the business.

We do not deem it necessary to discuss any of the other

points made by counsel. We see no reason for disturbing the decree of the court below.

The judgment of the appellate court is affirmed.

ORDINARILY, PLEDGEE HAS NO RIGHT TO SELL THING PLEDGED WITHOUT NOTICE to pledgor, but no notice is necessary where the property is pledged to secure the payment of notes authorizing the holder to sell upon non-payment or dishonor of the notes: *Jeanes's Appeal*, 116 Pa. St. 673; 2 Am. St. Rep. 624, and note.

FULLER v. DAUPHIN.

[124 ILLINOIS, 542.]

BOUNDARY LINE OF RIPARIAN OWNERS' LANDS. — The Mississippi River is not a navigable stream at common law, and the title of a riparian proprietor whose lands are bounded by it extends to the middle thread of the stream, and includes islands which are separated from the mainland by sloughs.

RIPARIAN PROPRIETOR. — **MEANDERED LINE IS NOT A BOUNDARY** which does not include the *locus in quo*, is not marked on the maps or draughts, but only appears in the field-notes of the original government survey, and is run for the purpose of ascertaining the quantity of land in a fraction, or inside the meander.

PRIORITY OF GRANT. — **CONVEYANCE UNDER THE SWAMP-LANDS ACTS** could not pass title to anything which previously to those acts had been conveyed by the United States.

James Shaw, for the appellant.

J. M. Hunter, for the appellee.

SHELDON, C. J. This was an action of trespass by Dauphin against Fuller for cutting timber, resulting in a verdict and judgment for the plaintiff for one hundred dollars damages. The land upon which the timber is alleged to have been cut is described in the declaration as "the island in Plum River Slough," being part of the southwest quarter of section 10, and a part of the northwest quarter of section 15, township 24 north, range 3 east, of the fourth principal meridian. The pleas were, not guilty, and a plea of *liberum tenementum*.

The chief question in this case seems to be one of boundary merely. The *locus in quo* is an island of five acres, in what is called Plum River Slough, a large running slough or arm of the Mississippi River, marked as "Navigable Plum River Slough" on the original government plat and survey, and being immediately below the town of Savanna, in Carroll County, in this state.

The plaintiff's claim of title is under the swamp-lands acts of Congress and the state of Illinois, and a conveyance of the land, in 1854, by the county of Carroll, as swamp-land, and also under the limitation statutes of the state. Defendant's claim of title is under a patent from the United States to Luther Bowen, of the date of May 1, 1845, conveying as follows: The west fraction of the southwest fractional quarter (west of Plum River) of section 10, in township 24, of range 3 east, in the district of lands subject to sale at Dixon, Illinois, containing 23¹⁰ acres, according to the official plat of the survey of said lands returned to the general land-office by the surveyor-general. The question is, whether this description embraces this island.

The land is described in the declaration as parts of two fractional quarter-sections in sections 10 and 15, but the proof only showed the cutting of timber on the north end of the island, located entirely on section 10. The land conveyed by this patent is described as "west of Plum River." Plum River appears to be on the east and north of it, and this Plum River Slough west of it. On the west of Plum River Slough, and between it and the main Mississippi River, is a large island, surveyed and platted, and sold by the government by patents. The land in controversy was never surveyed or platted by the general government, but in surveying the southwest fractional quarter of section 10, township 24, range 3, a meander line was run along the east bank of this navigable slough until it came down to this low piece of land, where the meander went to the east along a bank to the higher table-land. The meander line was not marked on the government plat of the section, but was run simply as a meander, and not as a boundary line.

Appellant insists that the patent for this west fraction of the southwest fractional quarter of section 10 conveyed all land up to the middle thread of this navigable Plum River Slough, and which would include this island. The case of *Middleton v. Pritchard*, 3 Scam. 510, would seem to be decisive of this question in favor of appellant. It was there decided that the Mississippi River is not a navigable stream at common law, and that the title of a riparian proprietor whose lands are bounded by it extends to the middle thread of the stream, and includes islands which are separated from the mainland by sloughs. Such extension of the grant by the patent here would include this island, it lying east of the

middle line of this navigable slough. It was also held in that case that a meandered line which is run for the purpose of ascertaining the quantity of land in the fraction is not a boundary. It was there said: "But it appears the surveyor of the government traced the courses and distances along the margin of the slough next the mainland, in order to estimate the quantity of land in the fraction, and which estimate did not include the *locus in quo*. But the plats in the land-office and surveyor-general's office have no lines marking these courses and distances as a boundary. They are taken from the field-notes of meandering in the surveyor-general's office." This was precisely the case here. Thorp, the county surveyor, testified: "This government meander line along the east bank of the swale I made simply from the field-notes of the original government survey. On the original plat made by the government, in connection with these field-notes, no meander line is actually marked out in any other way than simply by giving their courses and distances. There is no line made or given on the map. . . . According to the marking on the face of the plat, Plum River Slough is the west boundary of this land." The witness says further: "A meander line is a line run along watercourses. They are run for two purposes: one is to show the course of the stream; another is to calculate the area or number of acres inside the meander, whatever that fraction may be. They are never marked on the maps or draughts, but are simply preserved in the field-notes. They are only so preserved in the field-notes of this survey."

In *Canal Trustees v. Haven*, 5 Gilm. 558, in reference to a grant claimed to be bounded by the Des Plaines River, it was insisted that the stream was meandered, and a plat thereof returned to the surveyor-general's office, showing that the river was not included in the survey. The court, after remarking that such meandering appeared only by the minutes of the survey, and that neither the plats filed in the land or surveyor-general's office showed any lines marking the courses and distances along the margin of the river as a boundary of the adjoining land, say: "As there was, therefore, no marked line upon the plat by which the grant was made, defining and limiting the land granted to the margin of the stream, the whole argument founded upon such a supposed state of facts fails"; and then remark that a meandered line, which is run for the purpose of ascertaining the quantity of land in the fraction, is not a boundary, had been settled by the former

decision in *Middleton v. Pritchard*, 3 Scam. 510; 38 Am. Dec. 112. *Houck v. Yates*, 82 Ill. 179, reaffirms the decision that a meandered line is not a boundary line. The meandered line here does not include the *locus in quo*, but, according to the authorities cited, a meandered line is not a boundary line, and, as stated by the surveyor, according to the marking on the face of the plat by which the grant was made, Plum River Slough was the west boundary of the land granted, which carried the grant to the middle of the slough, and embraced the land in controversy. Of course, a conveyance under the swamp-land acts could not pass title to anything which, previously to those acts, had been conveyed by the United States.

As respects appellee's claim of title under limitation acts, by possession and payment of taxes under claim and color of title, there manifestly has not been shown any such possession of the land by appellee as will suffice for the acquisition of title under any statute of limitation, or otherwise.

The judgment will be reversed, and the cause remanded for further proceedings.

BOUNDARY OF LANDS BORDERING ON RIVER is the middle thread of the stream: See *Butenuth v. St. Louis Bridge Co.*, 123 Ill. 535; 5 Am. St. Rep. 545, a case in which the Mississippi River as a boundary was considered.

HENDERSON v. PEOPLE.

[124 ILLINOIS, 607.]

ENTICING AWAY UNMARRIED FEMALE FOR PURPOSES OF PROSTITUTION. —

Under Illinois statute, section 1 of Criminal Code, which provides that the enticing away for the purposes of prostitution or concubinage of an unmarried female of chaste life, and that the aiding or assisting in such abduction shall be a crime, etc., the *gravamen* of the offense is the purpose or intent with which the enticing or abduction is done. Illicit intercourse is not a necessary ingredient of the crime. The offense is complete the moment the subject is removed beyond the control of those legally in charge of her.

INSTRUCTIONS TO JURY IN PROSECUTION UNDER STATUTE FOR ENTICING AWAY UNMARRIED FEMALE of chaste life for purposes of "prostitution" or "concubinage" need not explain to jury the meaning of these terms under the statute, in the absence of any request so to do. There is at least no sufficient error therein to warrant a reversal on such grounds alone.

"CONCUBINAGE" UNDER STATUTE AGAINST ENTICING AWAY UNMARRIED FEMALE. — No great length of time or long-continued illicit intercourse is necessary to the establishment of that relation which results in concubinage.

ENTICING AWAY UNMARRIED FEMALE FOR THE PURPOSE OF PROSTITUTION.

The offense is complete under the Illinois statute, section 1, Criminal Code, making such act a crime, where the accused, under the professed purpose of marrying such female, entices her away from her parent's control and obtains illicit intercourse with her, but has no real intention of marrying.

John M. and John Mayo Palmer, and Patton and Hamilton, for the plaintiffs in error.

George Hunt, attorney-general, for the state.

MULKEY, J. At the September term, 1887, of the Champaign circuit court, the grand jury returned into open court an indictment founded upon the first section of the Criminal Code, against William Henderson, John Henderson, Carroll Shutt, and Julia Shutt. The first count charges that the defendants, on the second day of September, 1887, unlawfully and feloniously enticed and took away one Joanna Carman, then and there being an unmarried female of chaste life and conversation, from her parents' house, for the purpose of prostitution. In another count of the indictment the defendants are charged with enticing and taking away the prosecutrix for the purpose of concubinage. In other respects the latter count is like the first. Upon consideration of the evidence in the light of the charge of the court, the jury returned a verdict of guilty against all the defendants, fixing their respective terms in the penitentiary as follows: William Henderson's at eight years, Carroll Shutt's at two, John Henderson's at one, and Julia Shutt's at one. A motion for a new trial having been made and overruled, the court pronounced sentence and judgment upon the defendants, in conformity with the verdict. The question to be considered is, whether the finding of the jury, and the judgment and sentence of the court, are warranted by the law and the evidence.

The defendants William and John Henderson are brothers. Julia Shutt is their sister, and the wife of Carroll Shutt. The prosecutrix, Joanna Carman, is the daughter of Benjamin F. and Eliza Carman, and at the time of the alleged abduction was about fifteen years old. The Shutts and Carmans lived near each other in the city of Urbana, and had been on visiting terms some three years prior to this occurrence. William Henderson, the principal in the affair, is a barber by trade, and a dissolute, drunken character, who spent most of his time in the vicinity of Urbana, and was frequently at Shutt's house, with whom his brother, John, was temporarily stopping

at the time in question. About the 1st of July, 1887, William Henderson commenced making calls at Carman's house, and paying his attentions to the prosecutrix. It was not long before Mrs. Carman, her mother, became acquainted with his dissolute habits and bad reputation, and forbade his coming to her house any more. He nevertheless managed to meet with her daughter at Shutt's and other places, and finally, by means of promises, threats, etc., induced her to consent to an elopement, for the purpose, as he put it, of getting married, and she, doubtless, so understood it. In settling the preliminaries, he told her that they could start from Mrs. Shutt's, his sister's, — "that she would not give them away." They accordingly did start from there on the evening of the 2d of September, a little after dark. John Henderson, about dusk of that evening, went to Carman's house, where he found Joanna out in the yard, and without attracting the attention of any of the family told her that William was ready to go, and was up on the corner of the street waiting for her. After joining him on the street, the two repaired to Shutt's house, where all four of the defendants met together and talked over the matter of the elopement, which was accelerated by the approach of Joanna's sister, upon discovering which John remarked in the presence of them all: "Will, I tell you what is the matter; you want to hurry up and get out of here, because here comes Stell, and she is long-nosed, and will give it away." It was understood by all present that the two were to go to the Doyle House in Champaign City, but a short distance from Shutt's, for the purpose, as was stated to her, of waiting for the night train, but nothing seems to have been said about where they were to go beyond there, or their ultimate plans or purposes. On arriving at the hotel about eight o'clock, instead of sitting up for the train, or ordering separate rooms and making arrangements to be called for the train, Henderson engaged a single room "for," as he put it, "himself and wife," and the two were at once conducted to it, where they lodged together as husband and wife. They remained at the hotel together under that assumed relation until next evening about five o'clock, when they returned afoot to Shutt's house, John Henderson going back with them. They reached Shutt's house some time before night. John had visited them at the Doyle House three times that day,—in the morning, at noon, and in the evening,—and told them that they would have to keep hid or they would be found. After their return to Shutt's, on Satur-

day evening, Joanna's father came to the front gate, and was engaged in a conversation with Carroll Shutt; Joanna was at the time in the back yard, though she recognized her father's voice, and heard him make the remark: "That girl is in this town, and I am going to find her." The parties, however, were not speaking sufficiently loud to enable her to understand anything else that passed between them. While this conversation was going on, Mrs. Shutt, and John and William Henderson, were most of the time out in the back yard with Joanna, all of whom knew of the conversation, and that the object of Carman's call there was to find his daughter. Occasionally John Henderson would go round in front and participate in the conversation for a short time, and then return and caution the parties to speak lower, or they would be discovered. After Carman had left, and about eleven o'clock at night, the party out of doors, being informed the coast was clear, went into the house, whereupon Mrs. Shutt brought some bedding into the back room adjoining the kitchen, and threw it down on the floor, telling William to fix his bed, and he and Joanna were left in that room by themselves, where they slept together until about two o'clock in the morning, when John Henderson, Mrs. Shutt, her daughter and mother, rushed into the room where William and Joanna were sleeping, and told them to jump up,—that her father and mother, with the police, were at the gate. Being thus warned, they hastily retreated through a door leading to the rear of the building, whence, by means of an alley, they made their escape, John accompanying them to the fair grounds, but a short distance from the house. The latter, on parting with them, remarked, "I will bet, before tomorrow night I will be taken up for this." The two fugitives, after parting with John, proceeded afoot to Tolono, thence to Sadoris, thence to Ivesdale, and thence towards Bement. On Sunday night they lodged in a cornfield within about a mile and a half of that place. Monday morning Henderson went into the town, and brought back with him a young man, who, by his direction, took Joanna to Bement, and left her at a hotel, where, in a short time afterwards, she was taken into custody by an officer. Henderson, who had gone to town by another route, was soon afterwards discovered and placed under arrest.

This statement presents the substance of the prosecutrix's testimony, and we do not think its force or effect is materially impaired by the other evidence in the record.

The section of the statute above referred to, and on which the indictment is founded, is as follows: "Whoever entices or takes away any unmarried female of chaste life and conversation from her parents' house, or wherever she may be found, for the purpose of prostitution or concubinage, and whoever aids and assists in such abduction for such purpose, shall be imprisoned in the penitentiary not less than one nor more than ten years."

The elements which go to make up the offense created by this section of the statute are so plainly and concisely expressed that it would be useless to attempt to make any change in the language used, with the hope of presenting them in a more concise or perspicuous form. Indeed, the section, in both these respects, may be regarded as a specimen of model legislation.

But two questions are made in the brief of counsel for plaintiffs in error, and they will be considered in the order made.

It is contended, first, that the evidence fails to show that the prosecutrix was enticed and taken away from her father's house for the purpose either of prostitution or concubinage, but, on the contrary, for the purpose of marriage, only,—in other words, the enticing and taking away is confessed, but the purpose or intent with which it is alleged to have been done is denied. While the proofs satisfactorily show that the prosecutrix left her father's house with the intent and expectation of being married to the accused, and while it is equally clear that he professed to be taking her away for the purpose of marrying her, yet we agree with the jury and court below that that was not his real intention. On the contrary, we are of opinion that his expressed purpose to marry her was a mere subterfuge and pretense to enable him to get her completely within his power, that he might the more certainly and effectually overcome all scruples of modesty and virtue, and finally induce her to surrender her person and honor as a willing sacrifice to his licentious passion and beastly lust. That marriage was not seriously intended on his part, we think is shown by the decided weight of testimony. As a general rule, the safest way of judging one's intentions about a particular matter is to look to his acts rather than his professions respecting it, especially when they are found to be in conflict, as was the case here. The night train upon which Henderson pretended he wanted to leave did not reach the depot in Champaign.

City until about one o'clock in the night. It was in the light of the moon, and not a very long walk over to the depot, which was but a few steps from the Doyle House. Had his intentions been honorable, he would most likely have remained with his intended wife at his brother-in-law's until near train time, and then walked over to the depot,—at least this would have been the more natural and appropriate course to pursue. So far as the record shows, neither the place nor time of the marriage was prearranged, nor even so much as talked about, either before or after their departure. The evidence shows that Henderson personally knew that he could not get a license authorizing their marriage in this state without some one committing perjury, and the conclusion is warranted, from the evidence, that he was destitute of means to defray their traveling expenses out of the state, or anywhere else. Although his bill at the Doyle House was only one dollar, he was not able to pay that, and was compelled to pledge his satchel and contents, consisting of a few old razors, as security for the amount, and they were still unredeemed at the time of the trial. It is reasonable to suppose his impecunious condition was known to his brother and the Shutt family, and the fact that John went over to the Doyle House Saturday morning, and called upon the prosecutrix at her room, is a circumstance tending strongly to show that he did not expect them to leave on the night train. All day Saturday, when not in or about the Doyle House, the accused was out on the streets, drinking and spreeing around as usual. At five in the evening, as heretofore seen, he and the prosecutrix, accompanied by John, returned to Shutt's in broad daylight, and deliberately took up their quarters there, both occupying the same bed at night, in utter defiance of law, decency, and public morals. Is there anything in all this tending to show that his object in taking her from the home of her parents was to make her his wife, rather than his kept mistress? If there is, we confess we have not been able to discover it.

As before indicated, the *gravamen* of the offense is the purpose or intent with which the enticing and abduction is done, and hence the offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents, or of others having lawful charge of her, whether any illicit intercourse ever takes place or not. Subsequent acts are only important as affording the most reliable means of forming a correct conclusion with respect to

the original purpose and intention of the accused. It is with this view we have gone so minutely into the history and details of the case as we have.

The remaining point to be considered is, whether there is any material error in the charge of the court to the jury for which the case should be reversed. The record shows that the court gave a general charge to the jury on its own motion, and that no other instructions were asked or given. One of the objections taken to the charge is, that the court should have explained to the jury what is meant by the terms "prostitution" and "concubinage," as they occur in the statute. The court was not asked to give an explanation of these terms, and no reason is perceived why it should have done so in the absence of such request. At any rate, it would be going much further than we are prepared to go to reverse the judgment on that ground. The words in question are in general use, and we have no doubt that they were used by the legislature in their general or popular signification. They are in no sense words of art or technical terms; and if it were apprehended that they would not be correctly understood by the jury, counsel should have prepared an instruction defining the words, and submitted it to the court, to be ruled upon in the usual way. It is but a fair presumption that the jury understood the words in the sense in which they are used in the statute, and that they were used by the court in its charge in the same sense.

It is said that "nothing short of continuous and regular illicit intercourse would constitute concubinage," within the meaning of the statute; and *Slocum v. People*, 90 Ill. 274, is cited in support of the statement. Conceding this to be so, it does not follow that the court erred in neglecting to give an instruction that was not asked for. With respect to the case cited, it was clearly decided right. Yet we think there are certain expressions in the opinion which were not necessary to a decision of the case,—that if applied to cases under the statute that might be suggested would need modification. If by the above statement it is intended to assert that any great length of time or long-continued illicit intercourse is necessary to the establishment of that relation which results in concubinage, the proposition, in our judgment, is unsound. The relation which gives rise to the disreputable state of woman indicated by that term may, like that of marriage, be contracted or assumed in a day as easily as in a year. When a

single woman consents to unlawfully cohabit with a man generally, as though the marriage relation existed between them, without any limit as to the duration of such illicit intercourse, and actually commences cohabiting with him in pursuance of that understanding, she becomes his concubine, or, as it is usually expressed in modern times, "his kept mistress," which amounts to the same thing. So we hold in this case that when the heartless libertine, by his seductive arts or other means, induces his confiding or intimidated victim, as the case may be, to abandon home and the wholesome restraints of parental authority to accompany him whithersoever he may see proper to take her, without limit as to time or place, for the purpose of submitting to his licentious embraces, and ministering to his unbridled lust, he clearly brings himself within the provisions of the section of the statute we are now considering, and subjects himself to the punishment therein denounced. In short, we do not think any of the objections pointed out to the charge of the court materially affected the result, or are, in any view, of so serious a character as to require a reversal of the judgment. Upon the whole, we think the charge was fully as fair to the accused as it ought to have been. In our opinion, a clear case is made out against William Henderson; and if it be possible to make out a case of aiding and assisting in the commission of an offense, it must be admitted that it has been done in this, as to the other defendants. The evidence not only shows them guilty, but demonstrates that they knew at the time they were violating the law.

The judgment will be affirmed.

GIST OF OFFENSE OF ENTICING UNMARRIED FEMALE FOR PURPOSE OF PROSTITUTION is the taking away of the female from the control of those legally in charge of her: *People v. Demoussat*, 71 Cal. 611.

SCHALUCKY v. FIELD.

[124 ILLINOIS, 617.]

DEMURRER. — WHERE REPLICATION IS FILED TO A PLEA, and the replication is demurred to, the demurrer will be carried back and sustained to the plea itself, if that is defective.

STATUTE OF LIMITATIONS. — ENTRIES IN DEPOSITOR'S BANK-BOOK CONSTITUTE "EVIDENCE OF INDEBTEDNESS IN WRITING," within the meaning of the Illinois statute (section 16), since the entries having been made by the bankers, they charge themselves with the money deposited; and where the liability of stockholders must, under the charter of incorporation, be regarded as that of partners, the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned.

AN ACTION AT LAW BY A SINGLE CREDITOR WILL LIE AGAINST ANY STOCKHOLDER of an insolvent corporation to enforce an individual liability created by its charter.

STOCKHOLDERS ARE PARTNERS, AND LIABLE AS SUCH TO THE CREDITORS OF THE CORPORATION to an amount equal to the amount of stock held by them, respectively, under a provision of incorporation that "when default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively."

Blum and Blum, for the plaintiff in error.

MAGRUDER, J. This action was brought by the plaintiff in error, in the superior court of Cook County, against the defendant in error, as a stockholder in the German Savings Bank of Chicago, to recover the balance due upon certain amounts deposited by him in said bank. The judgment was in favor of the defendant, and on appeal to the appellate court of the first district, was affirmed. The case is brought before us by writ of error to the appellate court, two of the judges having granted the statutory certificate of importance.

The provision in the bank's charter (being section 9 of the act of the legislature of Illinois incorporating the bank, to be found in Private Laws of 1869, volume 3, page 393), upon which the individual liability of the stockholders is founded, and upon which this suit was brought, is as follows: "When default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively," etc.

This suit was begun on September 19, 1883, and an amended declaration was filed on December 26, 1883. The declaration avers that defendant was, on January 1, 1874, the owner of

fifty shares of the stock of said bank, amounting to five thousand dollars, and that since July 1, 1877, the bank has been utterly insolvent, and that demand has been made on it, etc. The declaration also avers that plaintiff made a number of deposits of money in the bank between August 8, 1874, and July, 1877, and received a number of payments out of these deposits during that period, leaving a balance due him on July 1, 1877, upon which a payment of \$359.62 was subsequently made. It is further averred that the deposits and interest thereon were entered by the bank in a bank or pass book issued by it to the plaintiff, wherein the bank, when such deposits were made and the interest became due, made entries in writing, as evidence of its indebtedness to the plaintiff. The amount sued for is the balance shown to be due by the written entries in the pass-book.

The plaintiff pleaded three pleas to the amended declaration: 1. *Nil debet*; 2. That the cause of action did not accrue within two years next before the commencement of the suit; 3. That the cause of action did not accrue within five years next before the commencement of the suit. The plaintiff joined issue on the first plea, and demurred to the second. He filed a replication to the third plea, setting up a payment to him, on June 30, 1883, of \$359.62 by a receiver of the bank, appointed in a chancery proceeding brought against the bank at the suit of certain creditors. This sum was the amount of a dividend of seventy per cent upon plaintiff's claim, declared in said proceeding and paid under the order of the court. The defendant demurred to the replication.

The cause was heard upon plaintiff's demurrer to the second plea, and upon defendant's demurrer to the replication to the third plea. The court sustained both demurrers, and rendered judgment in favor of the defendant for the costs.

Even though the replication to the third plea be defective, yet the demurrer must be carried back and sustained to the third plea, if the latter is defective: *P. & O. R. R. Co. v. Neill*, 16 Ill. 269.

The only matter, then, which is presented for our consideration is the validity of the third plea. The question to be determined is, whether or not the cause of action in this suit is barred by the five years' limitation of the statute.

Section 15 of the limitation law provides that "actions on unwritten contracts, express or implied, . . . and all civil actions not otherwise provided for, shall be commenced within

five years next after the cause of action accrued." Section 16 provides that "actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued," etc. The period of ten years named in the latter section was sixteen years under the law of 1849, which was in force before July 1, 1872.

In *Jassoy v. Horn*, 64 Ill. 379, the action was *assumpsit*, and the evidence of indebtedness, produced by the plaintiff, was a depositor's bank-book kept in the usual form; the bar of five years was pleaded, but it was held that the account evidenced by the bank-book was not barred until the lapse of sixteen years after the cause of action accrued. In that case we said: "The entries in the book were made by the bankers, and they charged themselves with the money deposited. They constituted 'evidence of indebtedness in writing,' within the meaning of the statute."

Therefore, as between plaintiff in error and the German Savings Bank, this action was not barred by reason of its not being brought within five years, but must be regarded as having been brought upon such an "evidence of indebtedness in writing" as would not be barred until after the lapse of ten years.

Does it make any difference that the action is against a stockholder and not against the bank itself?

This court has frequently held that an action at law by a single creditor will lie against any stockholder of an insolvent corporation to enforce an individual liability created by its charter: *Culver v. Third National Bank*, 64 Ill. 528; *Corwith v. Culver*, 69 Id. 502; *Tibballs v. Libby*, 87 Id. 142; *Fuller v. Ledden*, 87 Id. 310; *McCarthy v. Lavasche*, 89 Id. 270; 31 Am. Rep. 83; *Arenz v. Weir*, 89 Ill. 25; *Buchanan v. Meisser*, 105 Id. 638; *Thompson v. Meisser*, 108 Id. 359. In the last two cases, the section of the charter of the People's Bank of Belleville, under which suits were brought by creditors against Meisser, as a stockholder, was exactly the same as section 9 of the German Savings Bank of Chicago, as above quoted.

The stockholders, with respect to their personal liability under such a provision as section 9, are in effect partners, and are liable as such to the creditors of the corporation to an amount equal to the amount of stock held by them respectively. The stockholders in the German Savings Bank assumed a primary liability to the creditors to pay the in-

debtedness of the bank to the amount stated in section 9. When a debt was contracted by the bank, the liability of those who were then stockholders attached, and from that moment they became bound in the same manner and with like effect as if they had been doing business as partners unincorporated, except that the liability of each stockholder was limited to an amount equal to the amount of stock held by him: *Fuller v. Ledden, supra*; *Thompson v. Meisser, supra*.

Inasmuch as the liability of the stockholders to the creditors is primary, and must be regarded as that of partners unincorporated, it follows that the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned. The stockholder owes the same debt to the depositor which the bank owes. He can be sued for that debt just as the bank may be sued, and as soon as the bank may be sued. There is no reason why the remedy should be pursued within a shorter time in the one case than in the other. It is true that the entries in the pass-book are made by an officer of the bank, and not by the stockholder. But such officer, in making the written entries, acts as the agent and representative, not only of the corporate entity known as the bank, but of the stockholders regarded as unincorporated partners. The written evidence of indebtedness is as binding upon the latter as upon the former: *Wood on Limitation of Actions*, sec. 149; *Conklin v. Furman*, 8 Abb. Pr., N. S., 161. The liability of the stockholder "ends at the same time that liability on the part of the corporation ends," and not sooner.

We are, therefore, of the opinion that this action against defendant in error was not subject to the bar of the statute of limitations until after the lapse of ten years, according to the terms of section 16, as above quoted.

In the consideration of this case, we have not been aided by any argument on behalf of the defendant in error.

The judgments of the appellate and superior courts are reversed, and the cause is remanded to the superior court of Cook County for further proceedings in accordance with the views here expressed.

LIABILITY OF STOCKHOLDERS OF CORPORATIONS: See the extended note to *Thompson v. Reno Bank*, 3 Am. St. Rep. 806-873; and see *Marshall Foundry Co. v. Killian*, 99 N. C. 501; 6 Am. St. Rep. 539.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

WILLIAMS *v.* LEWIS.

[115 INDIANA, 45.]

SALE OF PARTNERSHIP PROPERTY ON EXECUTION — INJUNCTION. — Interest of one partner in goods or property of the firm may be seized and sold on execution; but specific articles of partnership property cannot be levied upon and sold; and if the officer seeks to sell such specific articles, the other partners may enjoin the sale or delivery of the articles.

ESTOPPEL. — DECLARATIONS OF ONE PARTNER THAT PROPERTY LEVIED ON AND SOLD UNDER EXECUTION is the individual property of another partner, for the satisfaction of whose debt it is taken, when made without the knowledge of the copartners, do not estop the firm from asserting that it was partnership property; and notice to one partner that property was about to be so sold, and his acquiescence in the sale, do not estop the partnership from asserting its claim thereto.

INJUNCTION — TENDER. — SALE OF PARTNERSHIP PROPERTY UNDER EXECUTION MAY BE SET ASIDE, and purchaser of such property may be enjoined from its removal where it has been wrongfully sold to and purchased by him at such sale; nor is it necessary in such suit to tender to the purchaser the price paid by him for the property, and it makes no difference that a remedy at law by way of replevin for the property might be brought.

W. R. Johnston, J. D. Works, and L. O. Schroeder, for the appellant.

J. B. McCrellis and G. S. Pleasants, for the appellees.

MITCHELL, J. Complaint by James W. Lewis, Benjamin W. Simmons, and James C. Long against John E. Williams, to set aside a constable's sale of certain personal property, and to enjoin the defendant from removing property alleged to have been wrongfully sold to and purchased by him at such sale.

It is charged in the complaint that, in February, 1885, the plaintiffs, as partners, under the name of Lewis, Simmons, and Long, were the owners of a stationary steam saw-mill, with engine, boiler, carriage-way, trucks, eleven saws, and other attachments complete, all of which were situate in the city of Vevay, Indiana, and that the partnership affairs remained unsettled, the firm being still indebted to divers persons, whose names are set out.

It is averred that a judgment had been recovered against James W. Lewis, one of the partners, for an individual debt, and that an execution had issued thereon, in virtue of which the constable had seized and sold the engine and boiler, and the saw-frame and eleven saws above mentioned, as the individual property of Lewis.

It is further averred that the only interest which Lewis had in the property so levied upon and sold arose from his being a member of the firm of Lewis, Simmons, and Long, and that the only interest Williams had was such as he acquired through the constable's sale above mentioned.

It is averred that Williams and his employees were proceeding to tear down and remove the engine and boiler, and other articles which he assumed to own in pursuance of the purchase made as above, and that to detach and remove those articles would render the residue of the partnership property practically useless.

It was also charged that the defendant, Williams, was notoriously insolvent. Prayer that the sale be set aside, and the defendant enjoined from interfering with the property.

Williams answered, among other defenses, that the firm of Lewis, Simmons, and Long had ceased to transact business about a year before the sale under which he claimed, and that he was not aware at the time he purchased the property that it belonged to the firm of Lewis, Simmons, and Long. He alleged further that, before the execution was issued, Lewis claimed to own the whole of the property, and that he was offering to sell it to Simmons. He charged further that, before he bought the property, the constable to whom the execution was issued called upon Simmons, and informed him that he had an execution against the property of Lewis, and that he was about to levy on the property now in dispute, and that Simmons informed the defendant and the constable that the property belonged to Lewis individually, with the excep-

tion of a few dollars invested therein by the other partners in the way of repairs.

It is averred that Simmons was in Vevay from the time of the levy until the day of the sale; that he knew the property was advertised for sale, and that he made no objection, nor gave any notice of the claim of the firm; and that he again told Williams, on the day of the sale, that the property belonged to Lewis individually.

The court sustained a demurrer to the answer, and the propriety of this ruling is made the principal subject of discussion.

That the interest of one partner in the goods or property of the firm may be seized and sold upon execution for his individual debt, cannot be doubted; and it is likewise settled that, as incidental to the right of sale, the officer may, without interfering with the rights of the other partners, take possession of the interest seized, and deliver it to the purchaser, who takes subject to the rights of the other partners, and to the contingency that an accounting may show that he took no beneficial interest by the purchase. The purchaser cannot acquire specific articles of property at such a sale; but if the creditor of one partner sells his debtor's interest in the firm property, the purchaser may ultimately obtain any surplus that may remain after the firm creditors are paid, and the partnership accounts fully adjusted: *Ex parte Hopkins*, 104 Ind. 157; *Deeter v. Sellers*, 102 Id. 458; *Donellan v. Hardy*, 57 Id. 393; 2 Lindley on Partnership, 690.

Specific articles of partnership property cannot be levied upon and sold to satisfy the individual debt of one partner, and when the officer, instead of selling the whole interest of the execution debtor, sells the whole of certain specified articles of property belonging to a firm, the other owners may treat him as a trespasser, and may enjoin the sale or the delivery of the articles so sold: *Stumph v. Bauer*, 76 Ind. 157; *Branch v. Wiseman*, 51 Id. 1; *Moore v. Pennell*, 52 Me. 162; 83 Am. Dec. 500, and note; *Spaulding v. Black*, 22 Kan. 55; *Atkins v. Saxton*, 77 N. Y. 195; *Miner v. Pierce*, 38 Vt. 610; 2 Lindley on Partnership, 690.

Without disputing the propositions above stated, it is contended on appellant's behalf that the declarations made by Simmons, one of the partners, to the effect that the property levied upon and sold was the individual property of Lewis, estopped the former from afterwards asserting, as against the

appellant, who bought on the faith of his declarations, that it was the property of the firm. It is insisted, moreover, that notice to Simmons that the property was about to be sold as the property of Lewis was notice to the firm, and that his acquiescence in the sale, and his declarations in respect to the title, not only estopped him, but the firm of which he was a member as well.

It appears from the pleadings that both Lewis and Long were out of the state at the time, and had no knowledge of the levy and sale; that, although the firm had ceased carrying on its business, the debts had not yet been paid, nor the partnership account settled, nor the partnership property disposed of.

It is undoubtedly true that each partner is, in a qualified sense, the agent of his copartners in relation to the business of the firm, and that his acts and declarations in reference to the business in which he is at the time employed, within the scope of the partnership, are the acts and declarations of the firm; but one partner cannot, by his acts or declarations, in the absence of the others, deprive them, or either of them, of their interest in the firm property: *Rush v. Thompson*, 112 Ind. 158; *Bays v. Conner*, 105 Id. 415; *Hickman v. Reineking*, 6 Blackf. 387; *Union National Bank v. Underhill*, 102 N. Y. 336; *Kaiser v. Fendrick*, 98 Pa. St. 528.

The agency which exists between partners pertains only to the business of the firm, and the declarations of one partner which bind the others are such as pertain to and are made while employed about the business of the partnership: *Boor v. Lowrey*, 103 Ind. 468; 53 Am. Rep. 519; *Winchester etc. Co. v. Creary*, 116 U. S. 161; *Avery v. Rowell*, 59 Wis. 82.

Certainly, one partner cannot admit away the interest of his copartners in the partnership property, or transfer the interest of one partner to the individual creditors of the other in the absence of both; nor can he, by his declarations, make that a partnership transaction which does not appear to be such: *Blaker v. Sands*, 29 Kan. 551.

Whatever the motive of Simmons may have been in asserting that the property belonged to Lewis individually, the declaration was not made during the progress and within the scope of the partnership business.

While one partner may, under certain circumstances, in the absence of the others, dispose of the firm property or pledge it for a firm debt. he cannot, by an admission in the

absence of the other partners, convert that which was the property of the firm into the property of one of its members, and thus divert it from the payment of partnership debts: *Bond v. Nave*, 62 Ind. 505.

Neither can one member of a suspended firm, by standing by, estop the other members, who are absent, from asserting their interest in the partnership property.

The present case is not within the principle which ruled *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380, and cases of that class. As stated in the head-note to that decision, one of a firm of warehousemen falsely represented to a person who advanced money on the faith of the representation that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage a certain quantity of grain. It was held that where the authority of an agent or partner depends upon some fact outside the terms of his power, and which from its nature rests peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact.

The decision in the case cited is controlled by the fact that the representation was made in connection with an act which the partner was authorized to perform, and the fact misrepresented formed part of and was within the power of the partner whose representation was relied on. Where a party, dealing with one partner in respect to a matter which corresponds in every particular with the business of the firm, relies upon the representation of the partner as to any fact pertinent to the transaction in hand, which rests peculiarly within the knowledge of the partner, the firm is bound.

Declarations made by an agent or partner in response to timely inquiries relating to matters under his charge, in respect to which it is part of his business in the usual course to act or impart information, bind the principal or firm: *Xenia Bank v. Stewart*, 114 U. S. 224.

It is, however, no part of the business of partners to enlarge, deny, or affect the respective interests of members of the firm in the partnership property by declarations or admissions in the absence of each other. They are not constituted agents for each other for any such purpose. The agency extends merely to the conduct of the business of the firm: *Woodruff v. Scaife*, 83 Ala. 152.

It is not to be doubted but that partnership assets may be transferred in payment, or to secure an individual debt of one

partner, but this can only be done while the property is in the possession of the owners, and by the consent of all the partners: *Fisher v. Syfers*, 109 Ind. 514; *Carver Gin etc. Co. v. Bannon*, 85 Tenn. 712.

Of course, if one, seeing his property about to be levied on as the property of another, disclaims any ownership therein, or stands by and acquiesces in the sale, he will be estopped to assert a title as against an innocent purchaser. But a disclaimer by one partner cannot estop the others, unless it is known to and ratified by them, nor can the acquiescence of one bind the others who had no notice. *Caldwell v. Auger*, 4 Minn. 217, 77 Am. Dec. 515, is not in conflict with this conclusion.

While the answer may have been good, if no other interest than that of Simmons had been involved, since it was not good as an answer to the complaint by Lewis, Simmons, and Long, as partners, the demurrer was properly sustained. The complaint was sufficient. It was not necessary that the plaintiffs should have tendered the money paid to the constable by Williams. The firm received no benefit from the money. Nor does it make any difference that the plaintiffs had a remedy at law to replevy the property carried away. They have a right to invoke the aid of a court to enjoin the defendant from tearing down their engine and boiler and carrying it away, to the disruption and detriment of their property.

The judgment is affirmed, with costs.

LEVIES UPON PARTNERSHIP EFFECTS FOR PERSONAL DEBTS OF INDIVIDUAL MEMBERS OF FIRM create no lien upon those effects, and are, in fact, as nugatory as though levied upon the property of a stranger: *Richard v. Allen*, 117 Pa. St. 199; 2 Am. St. Rep. 652, and see note 655.

LEVY AND SALE ON EXECUTION OF PARTNERSHIP PROPERTY FOR INDIVIDUAL DEBT OF ONE PARTNER must be of an undivided interest in the chattel corresponding to the debtor's share in the firm: *Nixon v. Nash*, 12 Ohio St. 647; 80 Am. Dec. 390; *Hubbard v. Curtis*, 8 Iowa, 1; 74 Am. Dec. 283; *Moore v. Pennell*, 52 Me. 162; 83 Am. Dec. 500, and note 502.

BILL OF SALE BY ONE PARTNER TO SECURE HIS PRIVATE DEBTS CANNOT AFFECT TITLE OF COPARTNER in partnership chattels, unless sanctioned by him, and the vendee takes merely the individual interest of his vendor, subject to the rights of the other partner and partnership creditors; nor has such vendee the right to possession or division, while partnership debts exist: *Kingsbury v. Tharp*, 61 Mich. 216; but the individual interest of partner in partnership effects is attachable: *Trafford v. Hubbard*, 15 R. I. 326; and such interest may be sold for his separate individual debts: *Harris v. Phillips*, 49 Ark. 58; and in Arkansas, it is held that a partner has no such beneficial interest in firm's chattels as will be bound by general lien of an execution

against him individually: *Id.* Yet where real estate is bought with partnership funds for partnership purposes, and is used as such, and subsequently one partner conveys an undivided moiety to a trustee to secure individual debts, the trustee takes title to such undivided moiety, subject to the prior implied trust, in favor of partnership creditors; and to the balances found due the copartners on a partnership accounting; nor can a sale by such trustee be enjoined, because the purchaser at such trustee's sale would hold realty subject to such prior equities: *Cunningham v. Ward*, 30 Va. 572.

ONE PARTNER CANNOT BIND FIRM BY ACT OR DECLARATION CLEARLY WITHOUT the scope of the partnership business: *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Western Stage Co. v. Walker*, 2 Iowa, 504; 65 Am. Dec. 789; *Rush v. Thompson*, 112 Ind. 158.

HEUSTON v. SIMPSON.

[115 INDIANA, 62.]

ATTENDING PHYSICIAN MAY NOT, IN ACTION TO SET ASIDE WILL, TESTIFY, against objection, as to mental and physical condition of the testator, nor divulge, in such action, any information acquired by him while in the necessary discharge of his professional duty: *Indiana R. S. 1881, sec. 497.*

F. L. Prow, G. W. Friedley, and J. Giles, for the appellant.

M. F. Dunn, G. G. Dunn, W. H. Edwards, and T. Huston, for the appellees.

ELLIOTT, J. This action was brought by the appellant to set aside the will of his deceased brother, David Heuston.

The executor and devisees were made defendants.

On the trial, two of the physicians who attended the testator in his last illness were called as witnesses, and the appellant proposed to prove by them the mental and physical condition of the testator. The appellees objected, on the ground that an attending physician cannot testify as to the result of an examination made by him in a professional capacity, nor as to any facts observed or learned by him while acting in that capacity. The objection prevailed.

Appellees defend the ruling of the trial court upon the authority of section 497, Revised Statutes of 1881, and the case of *Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 203, 40 Am. Rep. 295. In that case, the court quoted with approval from the case of *Edington v. Mutual Life Ins. Co.*, 5 Hun, 1, this language: "The secrets of the sick-chamber cannot be revealed.

because the patient was too sick to talk, or was temporarily deprived of his faculties by delirium or fever, or any other disease, or because the physician asked no questions. The statute seals the lips of the physician against divulging in a court of justice the intelligence which he acquired while in the necessary discharge of his professional duty." The last sentence in the extract we have made from *Edington v. Mutual Life Ins. Co.*, *supra*, correctly declares the law.

If the knowledge is acquired in the chamber of the patient, and in the discharge of professional duty, the physician can make no disclosure. This is true, whether the knowledge is communicated by the words of the patient, or is gained by observation, or is the result of a professional examination. The law forbids the physician from disclosing what he learns in the sick-room, no matter by what method he acquires his knowledge: *Masonic Mut. Ben. Ass'n v. Beck*, *supra*; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84; *Penn. Mut. Life Ins. Co. v. Wiler*, 100 Id. 92; 50 Am. Rep. 769; *Carthage T. P. Co. v. Andrews*, 102 Ind. 138; 52 Am. Rep. 653; *Williams v. Johnson*, 112 Ind. 273; *Rapalje's Law of Witnesses*, sec. 272.

The rule we have stated is a general one, for the statute makes no exceptions. It is a rule that may be invoked by the representatives of the deceased patient. It must therefore apply to this case, unless the court legislates, and by legislation creates an exception. That we cannot do. The case before us is within the rule, and must be decided as the rule requires.

The question came before the court in *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, as it comes before us, in an action to set aside a will, and it was held, all the judges concurring, that the testimony was incompetent.

The case of *Coryell v. Stone*, 62 Ind. 307, is not in point. There was no such question in that case as we have in this, for there was no attempt in that case to secure a disclosure of knowledge acquired by a physician in his professional capacity.

In *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433, no question was made as to the competency of the witnesses, nor was any such question made in *Dyer v. Dyer*, 87 Id. 13, so that neither of these cases lends any support to the appellants' position.

The instructions, taken, as they must be, as an entirety, correctly stated the law to the jury.

Judgment affirmed.

PHYSICIAN WHO ATTENDS SICK PERSON IN CONSULTATION WITH PATIENT'S PHYSICIAN IS WITHIN STATUTORY PROVISION prohibiting physicians from disclosing information acquired in attending patients in a professional capacity, and necessary to enable them to act in that capacity; and the prohibition applies to testamentary cases: *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; and compare *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358.

BRANNEN v. KOKOMO, GREENTOWN, AND JEROME GRAVEL ROAD COMPANY.

[115 INDIANA, 115.]

NEGLECT OF THIRD PARTY WILL NOT BE IMPUTED TO PLAINTIFF seeking damages for injury occasioned by defendant's negligence, where plaintiff was injured without his personal fault while riding in a private conveyance under the sole control and charge of the owner and driver, who was a fit person to manage horses.

WHERE THE ISSUE IS NEGLIGENCE, IT MUST BE ALLEGED AND MADE TO APPEAR FROM THE EVIDENCE that plaintiff was not guilty of negligence contributing to the injury, and if from the whole evidence it cannot be determined whether or not he was free from such negligence, he cannot recover, unless the defendant be chargeable with willful wrong.

WILLFUL WRONG WHICH WILL JUSTIFY RECOVERY, NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE, exists where there is an express intent to commit the injury. It may also exist where there is a constructive or implied intent, as where the act which produced the injury is done under circumstances such as evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of, or where it is committed under such circumstances that the natural and probable consequences of the act would be to produce the injury; otherwise there is no such willful wrong.

J. C. Blacklidge, W. E. Blacklidge, and B. C. H. Moon, for the appellant.

M. Bell and W. C. Purdum, for the appellee.

ZOLLARS, J. In their special verdict, the jury found that, in 1884, the appellee was a gravel road corporation owning and operating the Kokomo, Greentown, and Jerome Gravel Road as a toll-road; that on the thirtieth day of October, 1884, Mary Carter was the employee and agent of the company, authorized to collect toll from travelers over the road; that she occupied a toll-house about one mile east of the city of Kokomo; that Jacob Templin, her son, lived with her, and assisted in the collection of tolls; that about 8:30 P. M. of said day appellant was riding in a spring-wagon drawn by two horses, and driven by David Brannen, he being the owner of the horses and wagon; that there were in the wagon, besides

appellant and said Brannen, four other persons, all of whom were on their way from Kokomo to near Greentown, some ten miles from that city; that the horses were but three years old, and one of them not gentle; that Brannen, the owner and driver, was considerably intoxicated, and when near the toll-gate, and intending to pass it without the payment of toll, stopped the horses, and, without speaking to them, struck them with a whip, which caused them to start and go in a lope and rapid gait, passing the toll-gate; that said Jacob Templin, who was collecting toll at the time, believing that the horses were thus driven with the intention of the persons in the wagon to run by the gate without the payment of toll, for the purpose of stopping them and compelling the payment of the proper toll, suddenly drew down the pole, erected for the purpose of preventing persons passing without the payment of toll, and in so doing, and by reason of the rapid driving, the same struck the front end of the wagon, and threw from it the six persons and the three seats upon which they were riding, and appellant was injured and suffered damages in the sum of fifty dollars; that had not the driver struck the horses, and caused them to move so rapidly, the pole would not have been let down, and appellant would not have received the injury; that the horses being young, it was an act of imprudence to strike them with a whip before passing the toll-gate, which act of imprudence or willful misconduct contributed to appellant's injury; that neither of the persons in the wagon tendered or offered to pay any toll until after appellant had received the injury.

Upon the special verdict, the substance of which we have given above, appellant moved for judgment in his favor in the sum of fifty dollars. That motion was overruled, and judgment was rendered for appellee for its costs. For a reversal of that judgment appellant prosecutes this appeal.

That Brannen, the owner and driver of the team, was guilty, not only of negligence, but also of a positive wrong, in attempting to pass the gate as he did without the payment of toll, is clear beyond question.

Whether or not, in a case like this, where the injured party was voluntarily riding in a private conveyance, the negligence of the owner and driver, over whom he had no control, and who was a fit person to manage the horses, should be so imputed to him as to defeat a recovery on his part, assuming that he was without personal fault, and that the only wrong

on the part of the defendant was negligence, is a question upon which the authorities are not in accord.

This court, however, has heretofore adopted and followed the line of decisions which hold that in such a case negligence will not be so imputed: *Town of Albion v. Hetrick*, 90 Ind. 545, 550; 46 Am. Rep. 230; *Terre Haute etc. R. R. Co. v. McMur-ray*, 98 Ind. 358, 369; 49 Am. Rep. 752. See also *Pittsburgh etc. R. R. Co. v. Spencer*, 98 Ind. 186.

It is the settled law in this state, also, that where the ground of the action is negligence, it must be a case of un-mixed negligence; that is, the plaintiff, in order to recover in such an action, must be free from negligence which contributed to the injury. It is equally well settled here, that in such an action the plaintiff must allege in his complaint that he was free from negligence which contributed to the injury; that it must in some way be made to appear from the evidence that he was free from such negligence; and that if from the whole evidence it cannot be determined whether or not he was free from such negligence, the finding and judgment must be against him: *Stevens v. Lafayette etc. G. R. Co.*, 99 Ind. 392; *Eberhart v. Reister*, 96 Id. 478; *Louisville etc. R'y Co. v. Lockridge*, 93 Id. 191; *Lyons v. Terre Haute etc. R. R. Co.*, 101 Id. 419; *Cincinnati etc. R. R. Co. v. Butler*, 103 Id. 31; *Indiana etc. R'y Co. v. Greene*, 106 Id. 279; 55 Am. Rep. 736; *City of Fort Wayne v. Coombs*, 107 Ind. 75; 57 Am. Rep. 82; *Belt R. R. Co. v. Mann*, 107 Ind. 89; *Cincinnati etc. R'y Co. v. Hiltzhauer*, 99 Id. 486; see also *Pierce on Railroads*, 298, and cases there cited.

In the case before us, the facts were found by the jury, and hence, as to whether appellant, upon those facts, was or was not negligent, is a question of law for the court: *City of Indianapolis v. Cook*, 99 Ind. 10; *Conner v. Citizens' Street R'y Co.*, 105 Id. 62; 55 Am. Rep. 177; *Pittsburgh etc. R. R. Co. v. Spencer*, *supra*; *Town of Albion v. Hetrick*, *supra*; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578.

As we have stated, when the issue is one of negligence, in order that the plaintiff may recover, it must be made to appear from the evidence that he was not guilty of negligence contributing to the injury. In this case, we are not called upon to pass upon the evidence, but upon the facts which the jury have found from the evidence. While there may be ground for argument as to whether the facts found affirmatively show appellant to have been guilty of wrong and con-

tributory negligence, we think that there is no reasonable escape from the conclusion that the facts so found fail to show that he was not guilty of such wrong and negligence. The correctness of this conclusion will be made more apparent by a reference to some of the facts stated in the special verdict, without undertaking to state just how much weight should be given to each separately. In the first place, the intoxication of the driver, and his course in striking the young horses, and attempting to run them through the gate without the payment of toll, show, at least, that he was reckless and bold, if, indeed, he was not an unfit person to manage the team. In the second place, appellant must have known that toll was due, and should be paid at the toll-gate. He knew, also, that no toll was paid or tendered before the attempt to pass the gate. There is nothing to show that he in any way remonstrated or objected to the course adopted by the driver to pass the gate without the payment of toll. For aught that is shown in the special verdict, he was acquiescing in the purpose of the driver, and all that he did in attempting to carry out that purpose.

Having reached the conclusion that appellant is not shown to have been free from wrong or negligence which contributed to the injury, it must follow that he cannot recover, unless appellee is chargeable with something more than negligence.

If, upon the facts found, it may be declared as a matter of law that in the lowering of the gate-pole appellee is chargeable with a willful wrong, appellant may recover, all other necessary facts being found in his favor, notwithstanding he is not shown to have been free from contributory negligence.

Contributory negligence ceases to be a defense when the wrong on the part of the defendant is, within the meaning of the law, willful: *Terre Haute etc. R. R. Co. v. Graham*, 95 Ind. 286; 48 Am. Rep. 719; *Ivens v. Cincinnati etc. R'y Co.*, 103 Ind. 27.

It remains, therefore, to determine whether the court ought to say, as a matter of law, that upon the facts found in the special verdict, appellee was guilty of a willful wrong which caused the injury to appellant.

In defining willfulness which will justify a recovery notwithstanding contributory negligence on the part of the plaintiff, it was said, in the late case of *Palmer v. Chicago etc. R. R. Co.*, 112 Ind. 250, that there may be a willful act in a legal sense, without a formal and direct intention to kill or wound

any particular person; or in other words, there may be a constructive or an implied intent without an express one.

In the case of *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185, it was said: "When an intention to commit the injury exists, whether that intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression."

In the case of *Louisville etc. R'y Co. v. Bryan*, 107 Ind. 51, it was said: "To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

And again, in the case of *Belt R. R. Co. v. Mann*, *supra*, it was said: "It is beyond question, that to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct, *quasi* criminal in character." See also *Louisville etc. R'y Co. v. Ader*, 110 Ind. 376.

In the case of *Pennsylvania Co. v. Sinclair*, *supra*, it was said: "As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish willfulness on the part of the defendant." See also *Gregory v. Cleveland etc. R. R. Co.*, 112 Ind. 385.

The law under which appellee was incorporated provides that the directors of the company may erect toll-gates and exact toll from persons traveling on the road: R. S. 1881, sec. 3640.

The purpose of the gate clearly is to enable the company to prevent the passage of travelers over the road without the payment of toll. In other words, it is intended to be a means of coercing the payment of the proper toll. The gate could be of no consequence if the company had not the right to close it, and thus prevent such passage of travelers over the road until the payment of the legal toll by them.

That the company has the right to close the gate and

detain travelers until they pay the proper toll, is further shown by section 3643, which provides a penalty for the unreasonable detention of such travelers after they have paid the toll.

Section 3644 imposes a penalty upon persons who shall run by the toll-gate without the payment of toll, or who shall defraud the company out of the legal toll, but it does not, either expressly or by implication, take from the company the right to close its gates, and thus prevent the passage of travelers on the road until the proper toll shall have been paid.

The company, then, had the right to close the gate as a means of coercing the payment of the legal toll, and in so doing its act was neither "unlawful" nor "wrongful," as charged in the complaint, unless, by reason of the time and manner of the closing, it was guilty of negligence or a willful wrong.

As we have seen, it cannot be held liable in this action on the ground of negligence, because it is not made to appear that appellant was free from negligence which contributed to the injury.

There is not sufficient in the special verdict to justify the court in declaring, as a matter of law, under the rule of the cases above, that the injury was willfully inflicted by the servant of the company, assuming that Templin is shown to have been a servant or agent of the company, so that it became liable for his acts.

It is stated in the verdict that, believing that the horses were driven fast with the intention on the part of those in the wagon of running by the gate without the payment of toll, for the purpose of stopping them, and compelling the payment of the proper toll, Templin suddenly drew down the gate-pole. That does not show that Templin had any actual intention or purpose to injure appellant or others in the wagon. On the other hand, it shows that he was attempting to do what he had a legal right to do, viz., to stop them, and thus compel the payment of the proper toll. Nor is it shown that what he did was "done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." It is stated in the verdict that, when near the toll-gate, Brannen stopped the horses, and, without speaking to them, struck them with a whip, which caused them to start in a lope and rapid gait, but it is not stated how near to the gate they were thus struck and started. It may be that they were so near as to make the lowering of the gate-

pole not only negligence, but such recklessness as to manifest a willingness to inflict the injury. On the other hand, the distance may have been such as to reasonably induce Templin to believe that he could lower the pole before the horses would reach it, and that, by so lowering it, those in the wagon would stop the horses before coming in collision with it. Upon any view that may properly be taken, there is not sufficient stated in the verdict to justify the court in concluding, as a matter of law, that the injury to appellant was willfully inflicted.

Having reached the conclusions above stated, it will not be necessary for us to consider the contentions of appellee's counsel, that the complaint does not charge that the injury was willfully inflicted, and that the facts stated in the special verdict do not sufficiently show that Templin was a representative of the company, so as to make it liable for his acts.

Judgment affirmed, at appellant's costs.

FACT THAT ACT OF THIRD PERSON MAY HAVE CONTRIBUTED TO THE FINAL CATASTROPHE WILL NOT EXONERATE a defendant sued for injuries resulting from an act which is unlawful, or is so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons: *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55.

SLIGHT CONTRIBUTORY NEGLIGENCE, WHEN DOES NOT BAR RECOVERY: *Wichita etc. R. R. Co. v. Davis*, 37 Kan. 743; 1 Am. St. Rep. 275, and cases collected in note 279.

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF DOES NOT BAR RECOVERY when defendant is guilty of wantonness, or gross or willful negligence: *Kennedy v. Denver etc. R'y Co.*, 10 Col. 503; *Louisville etc. R. R. Co. v. Brice*, 84 Ky. 298; *Louisville etc. R. R. Co. v. Ritter*, 85 Id. 268; and slight contributory negligence does not defeat plaintiff's action, unless it is the proximate cause of injury: *Ford v. Umatilla County*, 15 Or. 313; *Decamp v. Sioux City*, 74 Iowa, 392; *Renner v. Canfield*, 36 Minn. 90; *Farmer v. Railroad Co.*, 86 N. C. 564; *Horner v. Williams*, 100 Id. 230.

CONTRIBUTORY NEGLIGENCE — PLEADING, ABSENCE OF. — In Indiana, absence of contributory negligence must be averred: Note to *Ohio etc. R'y Co. v. Walker*, 3 Am. St. Rep. 645; except in actions for willful injury: *Gregory v. C. C. C. etc. R. R. Co.*, 112 Ind. 383; but a general averment that plaintiff was without fault is sufficient, unless the facts specially pleaded clearly show some contributory negligence in plaintiff: *Ohio etc. R'y Co. v. Walker*, 113 Id. 196; 3 Am. St. Rep. 638. But it is generally held, contrary to the Indiana rule, that plaintiff need not aver in pleading that his own negligence did not contribute to the result; and that it is for the party who relies upon contributory negligence as a defense to allege and prove it: See *O'Connor v. Missouri Pacific R'y Co.*, 94 Mo. 150; 4 Am. St. Rep. 364, and note 368; *Thompson v. Railroad Co.*, 51 Mo. 190; 11 Am. Rep. 443; *Lee v. Gas Light Co.*, 98 N. Y. 115; *Robinson v. Railroad Co.*, 48 Cal. 409; *Hocum v. Weitherick*, 22 Minn. 154.

ALVEY v. REED.

[115 INDIANA, 148.]

MECHANIC'S LIEN CANNOT BE ACQUIRED AGAINST PROPERTY OF AN INFANT, because an infant cannot make a valid contract, and a lien implies one.

ACTION TO QUIET TITLE TO LAND OWNED BY INFANT may be maintained by guardian, where notice of intention to hold a mechanic's lien thereon has been filed.

INFANT CANNOT BE ESTOPPED FROM ASSERTING HIS TRUE AGE, nor from avoiding his contract by pleading his disability.

I. N. Pierce, T. W. Harper, and L. Levieque, for the appellant.

ELLIOTT, J. The appellee, as the guardian of Jessie Bowser, brought this action to quiet title to land owned by his ward. It is alleged in the complaint that the appellant erected a house on the land; that at the time the house was built Jessie Bowser was under the age of twenty-one years; that she was the wife of James B. Myers, from whom she has since been divorced, and that the house was built under a written contract executed by Myers and his then wife.

The appellant filed a cross-complaint, wherein he alleged that, at the time the contract was executed and the house built, Jessie Myers appeared in size and development to be of full age; that she entered into a contract with the appellant to build a house on the land owned by her; that she agreed to pay him for building the house the sum of \$1,640, and that she paid him \$300, and for the remainder executed a note and mortgage; that when the house was completed, Jessie Myers for the first time informed appellant that she was a minor, and declared that she would not pay the note and mortgage, but would repudiate them when she arrived of age; that thereupon the appellant filed notice of intention to hold a lien on the property; that she has wrongfully and forcibly taken possession of the house, and now has possession of it.

The cross-complaint also avers that the improvement made by the appellant will increase the value of the property to the amount of \$1,640, and that the work done and materials furnished by him are of the reasonable value of \$1,640.

It is further averred that at the time the contract was executed, and until after the house was completed, the appellant was ignorant that Jessie Myers was a minor, and that he believed that she was of full age.

The complaint is good. A mechanic's lien cannot be acquired against the property of an infant. A lien implies a

contract, and as an infant cannot make a valid contract, no lien can be obtained against his property: *Price v. Jennings*, 62 Ind. 111; Phillips on Mechanics' Liens, sec. 108.

The case made by the cross-complaint is a hard one as against the appellant, but many cases—indeed, almost all cases—where infants are concerned are hard cases. We cannot, much as we are impressed by the equities of the appellant, find any principle upon which we can uphold his cross-complaint. It cannot be upheld on the ground of estoppel, because an infant cannot be estopped from asserting his true age, nor from avoiding his contract by pleading his disability: *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Jennings*, 62 Id. 111; *Rice v. Boyer*, 108 Id. 472; 58 Am. Rep. 53; *Sims v. Everhardt*, 102 U. S. 300; Field on Law of Infants, sec. 17.

A lien cannot be enforced without enforcing a contract, since, as we have seen, the right to a lien depends entirely upon contract, and as the contracts of infants cannot be enforced, the appellant has no right of action. If a right existed entirely independent of a contract, and was founded solely on a tort, it might be otherwise: *Rice v. Boyer*, *supra*, and authorities cited.

Persons who deal with infants do so at their peril, for the law interposes their nonage as a shield. If liens were allowed to prevail against infants, the result the law intends to prevent would follow, for they might be improved out of their property.

Judgment affirmed.

POWER OF INFANT TO AVOID HIS CONTRACT: *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379, and cases collected in note 384.

PLEA OF INFANCY IS NOT ESTOPPED by infant's fraudulent representation that he was of age: *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412, and note 413. But an action for deceit lies against an infant who has obtained property by the fraudulent representation that he was of age, and refuses to pay for it: *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53.

OUTLAND v. BOWEN.

[115 INDIANA, 150.]

AN ESTATE IS A CONDITIONAL FEE, AND NOT AN ESTATE-TAIL, where it is conveyed by warranty deed, in which a condition is written, after the description, that, in case of death of grantee without children, the land, or the proceeds arising from sale or otherwise, should fall back to the grantor's lawful heirs, and in case grantee's guardian should see fit, he might sell the land, provided the proceeds of the sale were devoted to grantee's use during her life, and after her death without heirs of her body, then the balance should be applied to grantor's heirs; to the lawful heirs of the grantor in such deed, whether considered as a conditional limitation or as a contingent remainder, is void.

ESTATE-TAIL, WHEN CREATED. — Whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate-tail. But it is well settled, on the other hand, that if it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as an estate-tail.

ESSENTIAL DIFFERENCE BETWEEN AN ESTATE UPON CONDITION AND AN ESTATE IN FEE, which determines upon the happening of some future uncertain but possible event, with a limitation over, conditioned upon the happening of the event, is, that in the latter case, upon the happening of the event, the estate either reverts to the grantor, or is carried by force of the deed to the person to whom it was granted; while in the former, the grantor must have, either expressly or by necessary implication, reserved to himself or his heirs a right of entry, upon breach of the condition, re-entry being necessary to revest the estate.

A CONDITIONAL LIMITATION IS AN ESTATE LIMITED to take effect after the determination of an estate, which, in the absence of a limitation over, would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation.

A REMAINDER CANNOT BE LIMITED TO TAKE EFFECT AFTER A FEE; or in other words, "where there is no reversion there can be no remainder."

WHETHER A LIMITATION IS VALID OR NOT IS TO BE DETERMINED BY THE DEED ALONE, and not by what might have happened, nor by what actually did happen. When the existing state of things at the time of its execution is disclosed, the deed must be left to speak for itself.

VOID LIMITATION, EFFECT OF. — When a limitation over is void, the estate of the first taker continues unimpaired. The rule applicable to such cases is, that a conveyance in fee, which by a subsequent condition is subject to an executory interest or limitation, which is void by reason of remoteness or on account of its being impossible or repugnant, creates an estate in the first taker which becomes vested as a fee-simple absolute.

AN ESTATE IN FEE CANNOT BE LIMITED UPON AN ESTATE IN FEE BY AN ORDINARY DEED of conveyance in Indiana, except as authorized by the Revised Statutes of 1881, section 2962, whether the limitation over be in the nature of a conditional limitation or a contingent remainder or use.

C. H. Burchenal, J. L. Rupe, W. A. Peelle, S. C. Whitesell, and B. F. Mason, for the appellants.

H. C. Fox and J. F. Robbins, for the appellees.

MITCHELL, J. On the twenty-fifth day of February, 1855, Joseph Bowen, Sen., executed a warranty deed in the common form, by which he conveyed a tract of land situate in Wayne County to his granddaughter, Rebecca Elizabeth Bowen, for the expressed consideration of eight hundred dollars.

Following the description of the premises conveyed, there was written this stipulation: "The condition of the above deed is such, that if the said Rebecca E. Bowen should die leaving no child or children, the above-described land, or its proceeds that may be realized by sale or otherwise, are to fall back to the lawful heirs of Joseph Bowen, Sen.; and also, should the guardian of the said Rebecca E. Bowen see fit to sell the above land, he can, by appropriating the proceeds of the sale to the uses of the said Rebecca E. Bowen while she may live, and then apply the balance, if she should die without heirs of her body, to the heirs of Joseph Bowen, Sen."

Subsequent to the execution of the deed, the grantee was united in marriage with the appellant, Josiah Outland, with whom she lived on the land conveyed until the year 1883, when she departed this life, leaving surviving her no child nor children. Her husband and mother survive as her only heirs at law.

The present litigation involves a controversy between those describing themselves as the lawful heirs of Joseph Bowen, deceased, grantor in the deed above mentioned, and the surviving husband and mother of Rebecca E. Bowen, concerning the title and ownership of the land conveyed by the deed of Joseph Bowen. The final determination of this controversy depends wholly upon the construction to be given to the deed, it being conceded that both parties assert title through that instrument. The inquiry is, What was the duration and quantity of the estate created in Rebecca E. Bowen, the first grantee, and was there a valid remainder or estate of any description limited over to those who now claim as the lawful heirs of the grantor?

It is contended on behalf of the appellants that the estate conveyed to the grantee named in the deed was one which, according to the rules of the common law, would have been

adjudged an estate-tail, and that since estates of that description have been abolished by statute in this state (R. S. 1881, sec. 2958, in force since May 6, 1853), it is now to be construed a fee-simple absolute. Without pausing to consider the sometimes apparently artificial refinements, or the numerous technical and ingenious distinctions of the common law in respect to the character of estates in land, we deem it sufficient to state our general conclusion here, and that is, that the estate created by the deed in question, while in many respects bearing some analogy to an estate-tail, was not one having the essential characteristics of an estate of that description. Ordinarily, an estate-tail is created by a conveyance or devise in fee to some particular person, with a limitation over, in the event of the death of the person named without issue, or upon an indefinite failure of issue. The doctrine of the books seems to be that whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate-tail: *Huxford v. Miligan*, 50 Ind. 542; *King v. Rea*, 56 Id. 1; *Tipton v. La Rose*, 27 Id. 484; *Shimer v. Mann*, 99 Id. 190; 50 Am. Rep. 82; *Eichelberger v. Barnitz*, 9 Watts, 447; *Polts's Appeal*, 30 Pa. St. 168; 1 Leading Cases on Real Property, 98.

But it is well settled, on the other hand, that if it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as estates-tail: *Hill v. Hill*, 74 Pa. St. 173; 15 Am. Rep. 545; *Nightingale v. Burrell*, 15 Pick. 104; *Allender v. Sussan*, 33 Md. 11; 3 Am. Rep. 171.

The deed under consideration created in Rebecca E. Bowen an estate in fee, which was determinable, however, upon the contingency that she should die leaving no child or children. There is nothing in the deed indicative of an intention to limit or restrain the grantee in the disposition of the estate, in the event she should leave surviving her a child or children. It left the estate to be transmitted to the child or children of the grantee, if any should survive, or to be disposed of by her in such other manner as she might determine, the only limitation or condition being that she leave surviving a child or

children. In this respect the deed lacks an essential element in the creation of an estate-tail. Moreover, it will be observed that according to the condition in the deed, if the grantee died without leaving a child or children, it is of no consequence that she may have had children, through whom she may have left grandchildren or other lineal descendants. The whole estate was granted to her in fee, but it was made to determine, by a limitation over in fee, upon the contingency of her death without leaving a child or children. Upon the happening of that event, whether soon or late, the land, or in case that had meanwhile been sold or otherwise disposed of, then the proceeds realized, were to vest in such persons, if any there could be, as might at that time occupy the relation of "lawful heirs" to the grantor.

The foregoing considerations confirm our conclusion that the estate created in Rebecca E. Bowen was not one which, at the common law, would have been adjudged an estate-tail. Of the estate created by the deed to Rebecca E. Bowen, we may say, primarily, it was a fee-simple, and notwithstanding the condition subsequently written in the deed, the estate was liable to become absolute, and continue perpetually in the first taker, her heirs and assigns: 1 Washburn on Real Property, 61, 62. This created in her a fee-simple conditional, or a fee of a determinable or conditional character: *Smith v. Hunter*, 23 Ind. 580; *Clark v. Barton*, 51 Id. 165; *Greer v. Wilson*, 108 Id. 322; Tiedeman on Real Property, sec. 26; Gray's Rule against Perpetuities, sec. 14.

It was necessary that two contingencies should arise or exist concurrently in order that the estate created might be defeated. One was, that the grantee of the precedent estate should die without leaving a child or children surviving. The other was, that the grantor, prior to that event, should have died leaving lawful heirs competent to take the estate limited over: *Hennessy v. Patterson*, 85 N. Y. 91.

The land was conveyed in fee to the first taker, and it remained uncertain until her death whether the estate conveyed would be defeated by the condition in the deed, or become absolute, and it could not be known until the death of the grantor who would take as his lawful heirs. Since it was doubtful whether either of these contingencies would happen, the grant created a fee in the grantee, and there remained in the grantor no future estate in reversion, but only what is called a naked possibility of reverter: Tiedeman on Real Property, sec. 385.

In no event was the estate to revert to the grantor or his heirs, so as to give them a right of re-entry as for a condition broken. The estate was to be carried over to the grantor's lawful heirs by the force and effect of the deed. The first taker's estate was therefore not an estate upon condition; but it was a conditional or determinable fee with a conditional limitation over. The essential difference between an estate upon condition and an estate in fee, which determines upon the happening of some future uncertain, but possible, event, with a limitation over, conditioned upon the happening of the event, is, that in the latter case, upon the happening of the event, the estate either reverts to the grantor, or is carried by force of the deed to the person to whom it was granted; while in the former, the grantor must have, either expressly or by necessary implication, reserved to himself or his heirs a right of entry, upon breach of the condition, re-entry being necessary to revest the estate: *Attorney-General v. Merrimack Mfg. Co.*, 14 Gray, 586.

"A conditional limitation is an estate limited to take effect after the determination of an estate, which, in the absence of a limitation over, would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation": Tiedeman on Real Property, sec. 281, note; 2 Washburn on Real Property, 562; *Brattle Square Church v. Grant*, 3 Gray, 142; 63 Am. Dec. 725; *Miller v. Levi*, 44 N. Y. 489; *Chapin v. Harris*, 8 Allen, 594; 1 Leading Cases on Real Property, 186. Concerning estates upon conditions subsequent, see *Cross v. Carson*, 8 Blackf. 138; the same case, with valuable note, 44 Am. Dec. 759.

Conditional limitations were not recognized by the common law as estates capable of being created by the same deed, with a prior estate or limitation. They could only be created so as to become valid and effectual under the statutes of uses and trusts, as shifting uses or executory devises: Tiedeman on Real Property, secs. 281, 418.

The second conclusion at which we have arrived is, that the limitation over to the "lawful heirs" of the grantor in the deed in question, whether considered as a conditional limitation or as a contingent remainder, is void. It cannot take effect for several reasons, some of which we proceed to state. Prior to the conveyance through which all the parties to this controversy claim title, the estate conveyed to Rebecca E. Bowen, as well as the remainder or contingent estate limited

over, formed one united estate in John Bowen, Sen. The entire estate was disposed of by the deed, there being no reversion to the grantor. As we have seen, the estate created in the first taker was not an estate upon condition, with a right of re-entry reserved to the grantor or his heirs, but a determinable or conditional fee, with a conditional limitation or remainder over. There was, therefore, no revision to the grantor or right of entry in his heirs. They cannot and do not claim as reversioners by inheritance from their ancestor, but through his deed as remaindermen, or as the owners of an estate created by a conditional limitation. They claim to derive their title through the same instrument as that through which the heirs of Rebecca E. Bowen claim: Williams on Real Property, 250.

It must follow, therefore, if there was no estate left in the grantor after the creation of the precedent estate vested in the first taker, he could create no remainder, as a remainder can only be created out of the estate left in the grantor after the creation of the particular estate. After the conveyance of an estate in fee, whether the fee be base, determinable, or conditional, there is nothing in the nature of an estate in the grantor out of which to create a remainder. It has, therefore, been laid down as one of the fundamental rules in respect to the disposition of real estate, that a remainder cannot be limited to take effect after a fee; or in other words, "where there is no reversion there can be no remainder": Tiedeman on Real Property, sec. 398, and cases cited in note; *Huxford v. Milligan*, *supra*.

This rule has always been held inflexible in cases of estates created by an ordinary deed, and is applied to estates limited over, whether they be contingent remainders or conditional limitations: Gray on Restraints on Alienation, sec. 22, and note.

Its force has been in no wise impaired or modified by section 2960, Revised Statutes of 1881, which has reference solely to the contingency upon which the remainder over shall take effect, and not to the quantity or duration of the precedent estate. It simply changes the common-law rule so as to allow the remainder over to abridge the precedent estate. The only modification of the rule in this state, in respect to the power to limit one fee upon another, results from the enactment of section 2962, which, among other things, declares that "a contingent remainder in fee may be created on a prior re-

mainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age." The estate limited over in the deed involved in the present case does not come within the permission of the above statute. The first estate was a fee, and the limitation over was to take effect at an indefinite period, depending upon the event of the death of the first taker at an undefined age.

The distinction between estates in remainder, such as might be created by deed at common law, and executory interests, such as could only be created by executory devises in wills, or by conveyances to uses by creating shifting and springing uses in deeds, is not to be lost sight of. Estates of the latter description arise when their time comes, of their own inherent strength, and when properly created do not depend for protection on any prior estate: *Brattle Square Church v. Grant*, *supra*; *Smith v. Hance*, 11 N. J. Eq. 244; 1 Leading Cases on Real Property, 151, 189; Williams on Real Property, 265, 283.

Except as authorized by the statute last above referred to, within the rule against perpetuities, an estate in fee cannot be limited upon an estate in fee by an ordinary deed of conveyance, whether the limitation over be in the nature of a conditional limitation or a contingent remainder or use. The creation of estates of that character requires a resort to other methods, concerning which nothing further need be said here.

The rule that a remainder in fee cannot be limited to take effect after an estate in fee is especially applicable in case the grantee of the precedent estate has, as is the fact in the present case, a general power of disposition, thereby leaving the limitation over to operate only upon what is left at the death of the first taker. In such a case, the limitation over cannot take effect either as a remainder or as an executory interest: Tiedeman on Real Property, sec. 398, and note.

The limitation over is void for another reason. The contingency upon which the conditional limitation was to take effect was liable to happen at any moment after the execution of the deed. The grantor having granted the whole estate in fee to the first taker, without reserving any estate to himself or to any other person, it was necessary that there should have been some certain person in being in whom the contingent or

conditional estate limited over could vest immediately upon the happening of the contingency which terminated the precedent estate: *Sharswood's Bla. Com.*, b. 2, pp. 166, 169, and note.

The limitation over was to the "lawful heirs" of Joseph Bowen, the grantor, who was then in life. As no one can be heir to the living, it follows that there was no person in being competent to take the estate limited over: *Moore v. Littel*, 41 N. Y. 66; *Winslow v. Winslow*, 52 Ind. 8; *Lyles v. Lescher*, 108 Id. 382.

Whether a limitation is valid or not is to be determined by the deed alone, and not by what might have happened, nor by what actually did happen. When the existing state of things at the time of its execution is disclosed, the deed must be left to speak for itself: *Bailey v. Sanger*, 108 Ind. 264.

It cannot be inferred that the expression "lawful heirs," as employed in the deed, was intended as the equivalent of children. The situation of the parties and circumstances tend to rebut such an inference.

The limitation over being void, the estate of the first taker continues unimpaired: *Leonard v. Burr*, 18 N. Y. 96. The rule applicable to such cases is, that a conveyance in fee, which by a subsequent condition is subject to an executory interest or limitation, which is void by reason of remoteness or on account of its being impossible or repugnant, creates an estate in the first taker which becomes vested as a fee-simple absolute: *Brattle Square Church v. Grant*, *supra*; *Locke v. Barbour*, 62 Ind. 577; *Gray's Rule against Perpetuities*, sec. 250.

Another and an independent reason why the limitation over is void and of no effect is, that the deed confers upon the taker of the precedent estate a general and unlimited power of disposition. This feature of the case need not be enlarged upon. As has been remarked, the deed created primarily an estate in fee in the grantee, subject to a condition, however, that upon the happening of a certain contingency the land, "or its proceeds that may be realized by sale or otherwise, are to fall back," etc. By necessary implication this conferred the power upon, and recognized the right of, the grantee, on arriving at the age of twenty-one years, to dispose of the land. After conferring an unrestricted power of sale, the attempt to hold on to or control the proceeds realized was futile. Whatever the intention of the grantor may have been, the power of disposition was fatal to the limitation over, the rule in such cases

being that an absolute power of sale in the first taker renders a subsequent limitation over repugnant and void: *Gifford v. Choate*, 100 Mass. 343; *Hale v. Marsh*, 100 Id. 468; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Id. 34; 28 Am. Rep. 1; *Van Gorder v. Smith*, 99 Ind. 404.

This subject was exhaustively considered, and the authorities collected, in *Van Horne v. Campbell*, 100 N. Y. 287; 53 Am. Rep. 166.

The power in the deed under consideration being general, coupled with an ill-defined and ambiguous interest in fee, the effect of the power is to raise the estate of the first taker, and define it as a fee-simple absolute. Where the estate of the first taker is certain and particularly defined, or where the power is limited and special, the power will not enlarge the estate as against a valid limitation over. Some rules must, however, be framed by which to arrive at the uncertain and ambiguously expressed intention of parties, and as absolute power of disposition and absolute ownership must, in the nature of things, be inseparably connected, the law declares that he to whom the one is given acquires the other by irresistible implication, unless the contrary clearly appears by the terms of the deed: *Van Gorder v. Smith*, *supra*, and cases cited.

John v. Bradbury, 97 Ind. 263, was decided upon the facts peculiar to that case, and contains nothing opposed to the conclusion arrived at here.

It follows from the conclusions thus reached that the demurrer to the complaint should have been sustained.

The judgment is therefore reversed, with costs.

ESTATES-TAIL — THEIR GENERAL NATURE, THE WORDS OF LIMITATION NECESSARY TO CREATE THEM, IN WHAT STATES THEY MAY BE CREATED, AND HOW BARRED. — *Their General Nature.* — Estates-tail are said to have derived their existence by virtue of the statute *de donis*, A. D. 1285, 13 Edw. I., the limitation being to some particular heir or class of issue of the grantee instead of to the general heirs. Under the above statute, the power to alien lands was cut off, and it also had the further effect by the entailments thereby created to create perpetuities. These estates were estates of inheritance, and were divided into tenant in tail general or special, the former being an estate limited to the heirs of a man's body, the latter being where the limitation was to certain heirs of the donee's body, as the heirs of his body begotten of a certain wife. There were also estates-tail male and estates-tail female, the limitation in the first being to the male heirs, and in the second to the female heirs, of the donee's body: Willard on Real Estate and Conveyances, 2d ed., 53; Boone on Real Property, secs. 24, 25; 1 Washburn on Real Property, 5th ed., 97 et seq.; 4 Kent's Com., 12th ed., 11 et seq.; *Price v. Taylor*, 23

Pa. St. 95; 70 Am. Dec. 105; *Jewell v. Warner*, 35 N. H. 176; *Pierson v. Lane*, 60 Iowa, 60; 2 Bla. Com. 112. Another estate which is classed by Blackstone as among freeholds, not of inheritance, is known as "tenant in tail after possibility of issue extinct. This happens where one is tenant in special tail, and a person from whose body the issue was to spring dies without issue, or having left issue that issue becomes extinct; in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct": 2 Bla. Com. 124. An estate-tail necessarily cannot extend to personalty; an ownership affecting chattels is not within the purview of the statute *de donis*: 1 Washburn on Real Property, 5th ed., 100; *Albee v. Carpenter*, 12 Cush. 382; and where terms of a bequest of personalty are such as would in a devise of land create an estate-tail, it operates as an absolute gift of the personalty, so that a bequest over on the failure of issue of the first taker is void: *Cleveland v. Havens*, 14 N. J. Ch. 101; 78 Am. Dec. 90.

Words of Limitation Necessary to Create Estates-tail. — It will be observed that the estate is one of inheritance, so that it would follow that words of inheritance should be used to create the fee, — that is, the word "heirs," in addition to words of procreation, are necessary, the usual word for this purpose being "body"; and no grant will create in the donee a fee-tail, if either words of inheritance or procreation are wanting; but the law in relation to estates-tail created under a will is not so strict, and it has been held that other equivalent expressions will answer in such case: 2 Bla. Com. 115; Boone on Real Property, sec. 26; Tiedeman on Real Property, ed. 1884, sec. 46; *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 237; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Nightingale v. Burrell*, 15 Pick. 104. "When the limitation is to take effect, not on an indefinite failure of issue of the prior taker, but on a failure of children only, or a failure of issue within a given time, then the limitation over will not raise an estate-tail, by implication, in the prior taker": Smith on Executory Instruments, 301, cited in *Hill v. Hill*, 74 Pa. St. 173, 15 Am. Rep. 545, where it was held that a devise to S., and in case of her death "leaving no issue or child," then over, did not create an estate-tail. In *Price v. Taylor*, 28 Pa. St. 95, 70 Am. Dec. 105, it was decided that a fee is converted by implication into an entail by a limitation over on the indefinite failure of issue, but if instead the limitation over be on default of issue at the death of the first taker, no such implication arises, and the limitation over merely reduces the fee to a conditional one, though where lands are devised to a person and his children, and he has no child at the time of the devise, an estate-tail vests in the parent: *Coursey v. Davis*, 46 Pa. St. 45; 84 Am. Dec. 519. So an estate-tail passes by a devise of land to be equally divided among three persons, with a subsequent provision that in case one of them shall die without lawful issue, the property given to him shall descend to the testator's heirs in fee: *Hayward v. Howe*, 12 Gray, 49; 71 Am. Dec. 734. And a devise to one and her heirs forever, "except she should die without an heir born of her own body," then to B, creates an estate-tail, with a remainder over: *Roach v. Martin*, 1 Harr. 548; 28 Am. Dec. 746. So a limitation in a will to one for life, with a power of appointment in favor of the issue of his body, and in default of such appointment to such issue, and if he died leaving no issue of his body, then over, creates an estate-tail in the first taker: *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399. So a grant of real property to a married woman for life, and thereafter to the heirs of her body, and to them and their heirs and assigns forever, creates in her an estate in fee-tail, descendible to her eldest son: *Hileman v. Bouslaugh*,

13 Pa. St. 344; 53 Am. Dec. 474. And a grant to N. during his natural life, then to his eldest male heir, and after his decease "to said male heirs and assigns forever," creates an estate for life in N.; and where, at the time of the testator's death, he had no children, but subsequently had several, but died leaving only his third son surviving him, it was decided that such son took an estate in tail male: *Canedy v. Haskins*, 13 Met. 389; 46 Am. Dec. 739. But in Georgia an estate-tail is not created by a bequest to a woman and the children of her body: *Hoyle v. Jones*, 35 Ga. 40; 89 Am. Dec. 273.

In What States They may be Created. — Estates-tail were in force in this country up to the time of our severance from the mother country, having come in with other existing laws known as English jurisprudence: 4 Kent's Com., 12th ed., 14. The existence of such estates has been, however, absolutely abolished in many states, being determined by statute to be estates in fee-simple absolute. Without expressly noting those states, it will be proper to note that no statutes exist, so far as we are able to discover, in Idaho, Iowa, Kansas, Montana, Nebraska, New Hampshire, Nevada, Oregon, South Carolina, Texas, Washington, and Wyoming. Whether or not the common law exists in those states must be determined by the adjudicated cases. In *Pierson v. Lane*, 60 Iowa, 60, the law in that state is fully considered, and the court there declares that the statute *de donis* does not exist as a part of its common law. The grant was made to P. and "the heirs of her body begotten by her present husband," naming him. "This grant," say the court, "creates what was known at common law as a conditional fee, and after the statute *de donis* as a fee-tail special, of which Blackstone gives the following illustration: 'As when lands and tenements are given to a man, and the heirs of his body on M. — his now wife — to be begotten,' — which illustration contains every condition of the grant now under consideration: 2 Bla. Com. 114. A fee of this kind was called a conditional fee, because if the grantee died without leaving the specified heirs, the land reverted to the donor. As soon, however, as the specified heirs were born, the estate became absolute, and the grantee could alienate it. If, however, he died without having alienated the estate, it descended to the specified heirs only to the exclusion of all others. . . . Under this statute (*de donis*) it was held that the donor was invested with the ultimate fee-simple of the land expectant on the failure of issue, and the grantee became tenant in fee-tail without the power of alienation upon the birth of specified heirs who inherited the estate: 2 Bla. Com. 110-113." The court then reviews the statutes of Michigan and Wisconsin in force on this point when Iowa was a part, respectively, of those territories, also the subsequent legislation relative to the repeal of certain acts in those territories, and adds: "We do not deem it necessary to determine the effect of the repealing act of July 30, 1840. The principles of the common law have been adopted in this country only so far as applicable to the habits and condition of our society, and in harmony with the genius, spirit, and object of our institutions: *Boyer v. Sweet*, 3 Scam. 121; *Van Ness v. Packard*, 2 Pet. 137; *Goring v. Emery*, 16 Pick. 107; *Lindsley v. Coats*, 1 Ohio, 243; *Commonwealth v. Knowlton*, 2 Mass. 534; *Wagner v. Bissell*, 3 Iowa, 396. The direct object of the statute *de donis* was to place restraints upon alienation and create perpetuities for the purpose of maintaining a landed aristocracy. Such purpose is entirely foreign to the genius and policy of our institutions. . . . We feel constrained to hold that the statute *de donis* is not 'applicable to the habits and conditions of our society,' nor in harmony with the genius, spirit, and object of our institutions, and hence that it is not in force as a part of the common law of this state." So in Oregon such estates are impliedly

abolished, since the statute there evidently confers the power of alienation, and also the power "to substitute a deed signed and witnessed for all common-law conveyances whatsoever": *Rowland v. Warren*, 10 Or. 129. The court in that case construes the statute *de donis* as converting the fee-simple conditional into a fee-tail by taking away the tenant's power of alienation. Substantially the same ruling obtains in New Hampshire, where it is held that, by implication, the statute of 1789 relating to devises and descents repeals the statute *de donis*, the argument being that "if our statutes have overturned the two great objects of the statute *de donis* to secure to the eldest sons in succession of the grantee an inalienable interest in the property, and to the grantor and his heirs the reversion on failure of the heirs of the body of the grantee, we may regard the statute as repealed, and with it all the doctrines of the English law on the subject of estates-tail": *Jewell v. Warner*, 35 N. H. 176; and the court concludes, after exhaustively reviewing the law, as follows: "Not one object of the statute *de donis* remained, no characteristic of an estate-tail continued to exist, and no other conclusion can be drawn than that the statute *de donis* was impliedly repealed and estates-tail finally abolished" in that state after the passage of the act above referred to. Id. 188.

In some of the states the effect of such provision as would, at the common law, amount to an estate-tail creates in the donee a life estate; there passes, however, at his death, to the one to whom it would pass at common law, an estate in fee-simple absolute: See Statutes of Arkansas, Colorado, Illinois, Missouri, and Vermont. It has been held that a quitclaim deed from a contingent remainderman to a tenant in tail in possession enlarges the latter's estate to fee-simple: *Smith v. Pendell*, 19 Conn. 107; 48 Am. Dec. 146; and under the rule of interpretation that favors heirs in doubtful cases, the Pennsylvania courts incline in favor of an estate-tail where it descends to all the children equally, as such case would be in exact accordance with the laws of lineal descent in that state: *Price v. Taylor*, 28 Pa. St. 95; 70 Am. Dec. 105; but it was held in the same case that the statute *de donis* was repealed in that state by the act of 1855, the purpose of which was to convert words of entailment in estates thereafter created into words of general inheritance in fee; and in the later case of *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399, it was also decided that an estate in fee-tail was, by the act of 1855, converted into an estate in fee-simple. So in Kentucky, words which would under a devise to a woman create in her an estate-tail at the common law, only confers on her an estate for life: *Carr v. Estill*, 16 B. Mon. 309; 63 Am. Dec. 548. And in Rhode Island, a statute limiting an estate-tail to "children of the first devisee" is not construed to limit the estate to the children of the first devisee in tail: *Lippitt v. Hustin*, 8 R. I. 415; 94 Am. Dec. 115. In *Orndoff v. Turman*, 2 Leigh, 200, 21 Am. Dec. 608, it is said that all estates-tail were docked by the act of 1776; and that also an alienation in fee by a tenant in tail executed with general warranty in 1769, the tenant dying in 1816, conveys to the alienee a fee-simple by reason of the acts of 1769 and 1785 abolishing estates-tail: Id.

How Barred. — A means of alienation was, subsequent to the statute *de donis*, provided in England by other statutes, and an estate might be alienated by fines and common recoveries. However, it is not believed that these modes now exist in any of the states: 1 Washburn on Real Property, 83, 84, 97, 98; Tiedeman on Real Property, ed. 1884, secs. 45, 49, 52; Williams on Real Property, 45 et seq.; 2 Bla. Com. 119; *Richmond v. Lippincott*, 29 N. J. L. 44. The estate, if it exists, may be conveyed in Massachusetts, Rhode

Island, Pennsylvania, Maryland, and Delaware, for which see statutes of those states; see also *Dewitt v. Eldred*, 4 Watts & S. 414; *Taylor v. Taylor* 63 Pa. St. 481; 3 Am. Rep. 565; *Leyle v. Edwards*, 7 Serg. & R. 322.

ESTATES-TAIL ARE FORBIDDEN IN KENTUCKY, and estates which at former times would have been deemed estates-tail are now held to be estates in fee-simple; and under a deed worded thus, "I, John W., have bargained and sold and do transfer and convey to Jane W. (wife of Isaac W.), and to the heirs of her body by the said Isaac W., a certain tract of land, . . . to have and to hold the same to said Jane W. and the heirs of her body by the said Isaac W.," it was held that the children of Jane and Isaac W. were as certainly identified as if they had been named, and that they took by the conveyance a present interest with their mother: *Brann v. Elzey*, 83 Ky. 440.

IN PENNSYLVANIA, UNDER A DEVISE worded "unto said sister and at her death to her child, children, or other lineal descendants," it was held that the words "other lineal descendants" so qualify the previous words "child, children," as to make them words of limitation, and not of purchase, and the estate of first taker is an estate-tail: *Mason v. Ammon*, 117 Pa. St. 127.

LOUISVILLE, NEW ALBANY, AND CHICAGO RAILWAY COMPANY v. WRIGHT.

[115 INDIANA, 378.]

NEGLIGENCE — LOW BRIDGES. — EMPLOYEE OF RAILROAD COMPANY HAS RIGHT TO ASSUME that it has constructed and maintained its roadway and bridges in such a manner and condition that, as a brakeman upon its trains, he can perform his duties with reasonable safety, and that if there is any such danger to be encountered in the service as a low bridge, he will be warned of it.

IT IS THE DUTY OF MASTER TO INFORM SERVANT OF INCREASED DANGER AND HAZARD created by him in the change of machinery or premises, unless the servant has notice, or the change and increased danger are so apparent that he ought to take notice.

MASTER SHOULD INFORM SERVANT WHEN HIRING HIM WHERE THERE ARE DANGERS AND HAZARDS known to the former, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, unless the danger is so apparent that the servant will be bound to take notice of it.

RAILROAD BRAKEMAN ASSUMES RISKS ORDINARILY AND PROPERLY INCIDENT TO SUCH SERVICE, but he does not assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice.

IT IS NEGLIGENCE IN RAILROAD COMPANY TO CONSTRUCT AND MAINTAIN A BRIDGE SO LOW as not to afford sufficient space to allow brakeman to walk or stand without injury upon freight-cars in the discharge of his duty in the management of trains passing under it; and where the brakeman has no knowledge of the danger, and is injured by such bridge while acting in the line of his duty, the company is liable.

BILL OF EXCEPTIONS is in record, notwithstanding the rendition of the judgment and the approval of an appeal bond intervened between the overruling of a motion for a new trial and the giving of time within which to file such bill.

EVIDENCE THAT OTHER RAILWAYS MAINTAINED BRIDGES SIMILAR TO THAT BY WHICH PLAINTIFF WAS INJURED is not admissible.

COMPROMISE, OFFER OF, CONTAINED IN A LETTER IS NOT ADMISSIBLE IN EVIDENCE; nor are admissions in such letter competent when not made as independent facts, simply because they are facts.

EVIDENCE. — **PHYSICIAN** who has practiced medicine and surgery for more than twenty years, and who had attended plaintiff professionally for some two months after his injury, may, after stating in detail his condition and the character and condition of his wounds at the time he attended him, give his opinion as to the probable results of the plaintiff's injuries; and a hypothetical question involving the facts stated by such physician may properly be propounded to another physician.

EVIDENCE. — **FOR THE PURPOSE OF SHOWING NOTICE TO RAILROAD COMPANY THAT LOW BRIDGE WAS DANGEROUS,** it is competent, in action for damages for injury caused thereby, to show that on prior occasions other persons on the top of moving trains were injured thereby, and that some of them died in consequence.

PRACTICE. — **TO BRING INSTRUCTIONS INTO THE RECORD** without a bill of exceptions, the Indiana statute imperatively requires that they shall be signed by the judge and filed. That they must be thus filed is a rule of practice established by the legislature, which the supreme court cannot change: R. S. 1881, sec. 533, clause 6.

INSTRUCTIONS. — It is unnecessary to embody all the law of the case in one instruction; and where a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another; if an instruction is not erroneous as to the law, and is not full enough, the party who thinks it faulty should submit additional instructions.

INSTRUCTIONS. — All instructions given must be considered together, and if, so considered, they correctly and intelligibly state the law, and are not confusing to the jury, the judgment will not be reversed because of inaccuracy of some particular instruction.

ALTHOUGH INSTRUCTION IS ERRONEOUS, yet if it appear from the finding of the jury that it was a harmless error, it can furnish no ground of complaint.

W. F. Stillwell, G. W. Friedley, and G. W. Easley, for the appellant.

W. P. Adkinson, M. F. Chilcote, J. P. Wright, and E. P. Hammond, for the appellee.

ZOLLARS, J. It is charged in the complaint that near Putnamville the track of the railroad is laid in a deep cut, over which is a bridge upon a public highway; that the railroad company negligently constructed, and has negligently maintained, the bridge so low as not to afford sufficient space to allow brakemen walking or standing upon freight-cars in the discharge of their duty in the management of trains to pass under it with safety; that the railway company could, and should, have so constructed the bridge that brakemen could thus pass under it in safety; that it had full knowledge that

the bridge was dangerous to its brakemen operating its trains; that it negligently failed to place upon or about the bridge lights or other danger signals in common use with well-managed railways, to warn brakemen of the danger.

It is further alleged that on and for a short time prior to January 13, 1882, appellee was engaged in the service of the railway company as a brakeman upon a freight train which passed back and forth over the road, under the bridge, and that, with full knowledge of the dangerous condition of the bridge, the railway company negligently failed to notify him of the danger; that when the train upon which he was engaged as a brakeman was approaching the bridge at about three o'clock, A. M., of January 13, 1882, and when the rain was falling, and a heavy fog and intense darkness covered everything, so that appellee could not see or determine what point the train was passing or approaching, and being unacquainted with that part of the railway, and not knowing that the train was approaching a dangerous bridge, appellee obeyed a call to brakes, made by the engineer in charge of the engine, and went upon the top of the cars to set the brakes, as it was his duty to do as such brakeman; and that while setting the brakes the train passed under the bridge, which, without any fault or negligence on his part, was brought in contact with the back part of his head with such force as to fracture his skull, thereby rendering him unconscious for weeks, causing him great suffering, both physical and mental, so as to impair his mind, causing paralysis of his right side, and thus rendering him a cripple for life, so that he is, and will continue to be, unable to make a living by manual or mental labor. The complaint closes with a general charge that all of the injuries were the result of negligence on the part of the railway company, and without negligence on the part of appellee.

A motion was made below for an order upon appellee to make the complaint more specific. The motion was overruled.

We have considered the arguments of counsel in support of the motion, but do not think that the matter is of sufficient importance to require more than a statement that, whether the ruling of the court below was right or wrong, no substantial injury could result to appellant.

The court below overruled a demurrer to the complaint, and also a motion by appellant for judgment in its favor upon the answers of the jury to the interrogatories submitted by its

counsel. Those rulings are assigned as errors. They may be considered together.

The substance of the answers of the jury to the interrogatories, so far as material, is as follows:—

At the time of the injury to appellee, the railway company was maintaining, and for seven years prior thereto had maintained, an overhead bridge upon a highway crossing its track a short distance south of the town of Putnamville. The distance from the top of the rails upon the track to the bridge above was and is fifteen feet and nine inches. The box freight cars used by appellant were eleven feet high. Neither appellee nor any other full-grown man could walk or stand erect upon the top of such box-cars passing upon the track under the bridge without coming in contact with it. The only way in which appellee could have passed under the bridge in safety, when upon the top of such box-cars, was to sit down, or stoop very low. He could neither sit down nor stoop low enough to escape danger, and at the same time apply the brakes. The railway company neither erected nor maintained any danger signals to warn brakemen of the approach to or nearness of the bridge. By reason of the lowness of the bridge, and the lack of danger signals, the service of a brakeman upon appellant's freight trains over that part of its road was a hazardous and dangerous service, and that fact and all other facts in relation to the bridge were known to the railway company before and at the time it employed appellee as a brakeman, and at the time he was injured. Previous to his employment upon appellant's road, appellee had had about one month's experience as a brakeman upon the Ohio and Mississippi railroad. He was first employed by appellant on the fifth day of October, 1881, as a brakeman upon a freight train, his run being from New Albany to Greencastle, and continued in the service until the fourth day of November, 1881. That run carried him under the bridge in question. During that employment he passed with his train under the bridge from eight to ten times in the daytime, and the same number of times in the night. Subsequently, and on the eleventh or twelfth day of January, 1882, appellee was again employed by the railway company as a head brakeman to assist in operating freight trains, his run, as before, being from New Albany to Greencastle, and under the low bridge. From his first employment up to the time of his injury, he had passed under the bridge from seventeen to twenty times, one half of the

number being in the night-time. At no time previous to his injury did he know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the box-cars in attending to the brakes. He had no knowledge that the service was a hazardous one by reason of the low bridge, and was not notified of that fact, nor of any fact connected with the bridge, either by the railway company or any other person. The jury further answered that, prior to his injury, appellee did not have an opportunity to know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the top of freight-cars. They also answered that he made no effort to ascertain the height of the bridge, or whether or not he could with safety pass under it when upon the top of box-cars attending to the brakes.

They further answered that the danger of brakemen being struck by the bridge was an open and obvious one in the day-time, but not at night. They still further answered that, during the time appellee was in the employ of the railway company, he could not, by an ordinarily careful use of the opportunities afforded him, have discovered that the bridge was so low as to be dangerous.

On the morning of the thirteenth day of January, 1882, when it was yet dark, appellee started with his train south from the Greencastle junction towards New Albany. He knew that the first station south was Putnamville, and that the bridge in question was near to and south of the station, but he did not know of the danger. When within about one third of a mile of Putnamville, the engineer, by the use of the steam-whistle, called for the setting of brakes. In obedience to that call, appellee went upon the top of the cars and moved from the front towards the rear end of the train, until he reached the brake. The train was moving over a down-grade, and did not stop at Putnamville, but passed through and under the bridge some fifteen hundred feet south, the engineer not having shut off the steam soon enough to stop the train at the station. As the train passed under the bridge, appellee being at the brake in a stooping posture, and his face towards the rear of the train, the bridge struck him upon the back of the head, about one and one half inches from the top.

When called upon the top of the cars, appellee, because of the darkness, did not know what portion of the road the train was passing over. When the train was passing through Put-

namville, he was not aware of the fact, and when injured, did not know that the train was near the bridge. After going upon the top of the cars, he did not look in the direction in which the train was moving, and could not have seen the bridge had he looked, because of the darkness. Appellee could not, by the use of ordinary care and diligence, have avoided the injury.

In support of the motion for judgment in favor of the railway company upon the above answers to the interrogatories, its counsel argue that, upon the facts disclosed, it must be presumed and concluded, as a matter of law, that appellee contracted with the company with reference to the hazardous nature of the service, and that therefore he cannot recover.

The objections urged to the complaint, as we gather from the argument, are: 1. That no facts are alleged showing that the railway company was under a duty to erect or maintain any other or different bridge from that in question; 2. That no facts are averred showing that it was the duty of the railway company to have warned appellee of the danger, because the danger was in its nature open and obvious; 3. That it is not shown by the averments of the complaint that appellee's ignorance of the lowness of the bridge was not the result of want of ordinary care on his part; 4. That no facts are averred showing that the bridge was not built in the usual and ordinary way, and of the usual and ordinary height; and 5. That it is not averred that appellee did not know that the bridge was dangerous, by reason of being too low for a brakeman to pass safely under it when standing or walking upon the top of box-cars.

We think that the complaint sufficiently shows that appellee had no knowledge of the dangerous condition of the bridge. We think, too, that the complaint sufficiently shows that appellee's ignorance of the condition of the bridge was not the result of his own negligence. There is also a broad averment in the complaint that appellee received the injury without any negligence on his part: See *Town of Rushville v. Adams*, 107 Ind. 475; 57 Am. Rep. 124, and cases there cited.

He was required to observe ordinary care for his own safety, but he was not required to go over the road upon a tour of inspection, looking for defective bridges or faulty tracks, before engaging in the service.

Because of its duty to him, appellee had a right to assume that the railway company had constructed and maintained its

roadway and bridges in such a manner and condition that, as a brakeman upon its trains, he could perform his duties with reasonable safety, and that if there was any such danger to be encountered in the service as the low bridge, he would be warned of it.

In the case of *Boyce v. Fitzpatrick*, 80 Ind. 526, 529, in commenting upon cases cited, it was said: "These cases show that while a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer." See also *Rogers v. Overton*, 87 Ind. 410, 413.

In the recent case of *Pittsburgh etc. R'y Co. v. Adams*, 105 Ind. 151, 161, this court said that, as a general rule, in the contract of hiring there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery, and appliances for the conducting of the business safely.

In the recent case of *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88, 93, in speaking of low bridges, in a case in all essentials like that before us, and after citing the cases *pro* and *con*, it was said: "It seems to us that a railroad company is and ought to be required to construct and maintain its roadway and appendages and its overhead structures in such a manner and condition that its employee or servant can do and perform all the labors and duties required of him with reasonable safety." See the cases there cited; see also *Indiana Car Co. v. Parker*, 100 Ind. 181; *Umbach v. Lake Shore etc. R'y Co.*, 83 Id. 191; *Louisville etc. R. R. Co. v. Orr*, 84 Id. 50; *Atlas Engine Works v. Randall*, 100 Id. 293; 50 Am. Rep. 798.

In the case of *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 554, in speaking of the duty of the master to furnish a safe roadway, and to inform the servant of unusual dangers, it was said: "If a defect existed in the road which was known to the company, but which it was impossible for them to immediately remove or remedy, and in consequence thereof the road was unsafe but not impassable, and yet they should place an employee upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability."

See also *Thayer v. St. Louis etc. R. R. Co.*, 22 Ind. 26; 85 Am. Dec. 409.

In the case of *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160, it was said: "That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact, or put him in possession of such information; these general principles of law are elementary and firmly established," etc.

The facts in the case of *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593, in brief, were these: The railroad track at Mendota was about eighteen inches from the edge of an awning, which projected from the station-house, so that when a freight-car stood upon the track the inside edge of the car was about even with the outer edge of the awning. The awning was about eighteen inches higher than the car. There being a signal for brakes, the plaintiff in the case, a brakeman, ran upon the ladder on the side of a car, and before reaching the roof was struck by the awning and injured. It was insisted, in behalf of the railway company, that there could be no recovery, for the reason that the brakeman had assumed the risks incident to the service, and had an opportunity to know of the danger from the awning. In answer to that contention, the court said: "There are many freight depots and station-houses upon the line of the Central railway, and it would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by a collision with it. We held, in *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 201, 92 Am. Dec. 206, that the corporation is bound to furnish to its servants safe materials and structures, and must, in the first instance, properly construct its road with all its necessary appurtenances. This of course includes the obligation to keep in proper repair. When the appellee entered the service of this company, he had a right to presume that it

had in these respects discharged its obligations. The ordinary perils of railroad life he of course assumed, and also any special dangers arising from the peculiar condition of the road so far as he knew of their existence. . . . But it would have been morally impossible for him to have ascertained the existence of all such special perils as this which caused the injury, and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station where he was injured in the night, except upon two trips. Moreover, it is to be remarked that the danger was of such a character that it might well escape the observation of a person who had been even for a long time upon the road."

In Mr. Wood's work on railway law, volume 3, at pages 1480 and 1481, in speaking of low bridges, and the cases in which it was held that the railway company was not liable, it is said that the doctrine of those cases proceeds upon the ground that the servant knew of the hazard, and therefore assumed the risk incident to it, and that the master will be liable where the circumstances are such that the servant cannot be charged with such knowledge.

As it is the duty of the master to inform his servant of increased danger and hazard created by him in the change of machinery or premises, unless the servant has notice, or the change and increased danger are so apparent that he ought to take notice, so, where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, he should inform the servant of such danger when hiring him, unless the danger is so apparent that the servant will be bound to take notice of it: *Hawkins v. Johnson*, 105 Ind. 29, 35; 55 Am. Rep. 169; *Pittsburgh etc. R'y Co. v. Adams*, 105 Ind. 151, 165; *Bradbury v. Goodwin*, 108 Id. 286.

A person contracting to work upon a railway as a brakeman assumes the risks ordinarily and properly incident to such service, but he does not, by such hiring, assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice.

It cannot be said here that by the contract of hiring appellee assumed the risk of injury from the bridge by which he was injured. Clearly, it ought not to be said that the railway company was under no duty to build and maintain the bridge

in a different manner and condition from what it did. It is charged in the complaint, and shown by the answers of the jury to the interrogatories, that the railway company was guilty of negligence both in the building and maintenance of the bridge.

It is charged in the complaint that it was so low that a brakeman, in the discharge of his duty in setting brakes, could not, without injury, walk or stand upon the top of the cars. It is shown by the answers of the jury to the interrogatories that the distance from the top of the rails to the bridge was fifteen feet and nine inches, and that the box-cars were eleven feet high, thus leaving a space of four feet and nine inches only between the top of the cars and the bridge. To say that a railway company has performed its whole duty when it erects and maintains such a bridge is in effect to say that it may abandon all reasonable care for the safety of its brakemen upon its trains. At best, that service is hazardous enough. Surely the railway companies should not increase the danger by the erection and maintenance of such low bridges. All reasonable precautions ought to be taken to decrease the danger as much as possible. There can be no sufficient reason for a holding that while the railway company must exercise reasonable care to provide a safe roadway and bridges below, it may abandon, to a large extent, all care as to bridges above.

Called, as they often are, to their brakes upon the top of the train in rainy and dark nights, when they have no means of determining exactly the portion of the road over which the train is passing, it might be expected that brakemen will be injured by collisions with bridges such as that described in the complaint and the answers of the jury to the interrogatories.

Assuming that railway companies perform the duties which they owe to their employees, it cannot be conceded that the bridge in question was built of the usual and ordinary height.

There is nothing in the complaint or the answers of the jury to the interrogatories showing, or tending to show, that it is a usual or customary thing for railway companies to build and maintain overhead bridges so low as that which caused the injury to appellee.

It is shown that appellee had no knowledge of the condition of the bridge, and that his want of knowledge was not the result of negligence on his part. Because of his want of knowledge, and the increased and unusual hazard caused by the

lowness of the bridge, it cannot be said that appellee voluntarily assumed the risk of injury therefrom.

Both the demurrer to the complaint and the motion for judgment in favor of appellant upon the interrogatories were properly overruled.

In answer to their contention that the bill of exceptions is not in the record, because the rendition of the judgment and the approval of an appeal bond intervened between the overruling of the motion for a new trial and the giving of time within which to file a bill of exceptions, we refer appellee's counsel to the recent case of *Kopelke v. Kopelke*, 112 Ind. 435.

Appellant's counsel offered to prove that there are bridges on all railways in the United States too low for brakemen, standing or walking upon the top of ordinary box-cars, to pass under with safety. The court below did not err in excluding the evidence. As we have seen, a railway company falls short of its duty if it constructs overhead bridges so low as to be dangerous to its brakemen in the discharge of their duties. If such bridges are constructed, it is the duty of the company to notify its brakemen of the danger, unless they already have knowledge, or the circumstances are such that they are bound to take notice. That other companies may have neglected their duty, and built and maintained low and dangerous bridges, cannot exonerate, or tend to exonerate, appellant from liability. There may be some such bridges upon other roads; but there was no offer to prove that they are in such general use as to be an ordinary and usual incident of the service of brakemen. Here, appellee had had but two months' experience as a brakeman, and had no knowledge of the low bridge. The fact that other railway companies may have maintained some of their bridges so low as to be dangerous is not sufficient to charge appellee with notice here. If such low bridges are thus maintained, they are surely the exception, and not the rule: *Louisville etc. R'y Co. v. Pedigo*, 108 Ind. 481.

Appellant's counsel first offered to introduce in evidence a letter, and, second, a portion of a letter, written by appellee to an officer of the railway company before this action was commenced. It is earnestly insisted that the court erred in excluding the letter and the portion thus offered. The letter was written in answer to one received by appellee. It is well settled that an offer or proposition for a compromise of a legal controversy, not accepted, is not competent evidence for or

against either party: *Board of Commissioners v. Verbag*, 63 Ind. 107; *Dailey v. Coons*, 64 Id. 545.

It is also settled that an admission of an independent fact, in no way connected with the offer of compromise, although made during the negotiations, is competent evidence.

In the case of *Wilt v. Bird*, 7 Blackf. 258, it was said: "An offer, concession, or admission made in the course of an ineffectual treaty of compromise, and constituting in itself the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point."

An admission of a fact, not made simply because it is a fact, but expressly or clearly for the sake of and as a part of an attempted compromise, is not competent evidence in a subsequent action against the party making it: *Cates v. Kellogg*, 9 Ind. 506.

And so if an admission is made, not simply because it is a fact, but to open the way to a compromise, it is not admissible: *Binford v. Young*, 115 Ind. 174.

That the letter, as a whole, constituted an offer of compromise, is not questioned. We have examined the letter carefully, and are fully persuaded that no portion of it is competent evidence in this action against appellee.

It is very apparent that nothing was admitted as an independent fact simply because it was a fact, if, indeed, it can be said that there is any admission or statement that could in any way be beneficial to appellant. On the other hand, it seems very clear to us that all that was written was by way of argument for the purpose of bringing about an adjustment to avoid litigation. The whole letter had that single object in view, and, as said in the case of *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 548, in speaking of an offer to introduce a portion of a letter written with the object of effecting a compromise, "it contains no statement which can be separated from the offer and convey the idea which was in the writer's mind."

Dr. S. W. Yost, at the time of the trial, had been a practicing physician and surgeon for more than twenty years. *Prima facie*, at least, that rendered him competent to give an opinion as to the probable result of appellee's injuries. He had attended him as physician for some two months after he was

injured, at which time he was also in the employ of the railway company as surgeon.

After stating in detail appellee's condition, and the character and condition of his wounds at the time he attended him, he was allowed to state that the probabilities are that he will never to any great extent be able to perform manual or mental labor without a removal of a depressed portion of the bone, which was and is pressing upon the brain, by reason of the wound upon the head, and that such an operation would be fraught with great danger. It was competent for Dr. Yost to give his opinion as to the probable results of appellee's injuries: *Carthage T. Co. v. Andrews*, 102 Ind. 138, 145; 52 Am. Rep. 653; *Louisville etc. R'y Co. v. Wood*, 113 Ind. 544; *Louisville etc. R'y Co. v. Falvey*, 104 Id. 409; *City of Fort Wayne v. Coombs*, 107 Id. 75; 57 Am. Rep. 82.

His evidence in that regard was not incompetent because he had not attended appellee continuously up to the time of the trial. He could state his opinion, based upon his knowledge and observation at the time he attended appellee. Had he attended him continuously, his testimony might have been of more weight, but it would have been no more competent.

Objections were made below, and are urged here, to the testimony of Dr. Harry L. Taylor. He had been a physician and surgeon since 1872, and at the time of the trial was a professor in the Indiana Eclectic Medical College. *Prima facie*, he was competent to give an opinion as to the probable results of the fracture of appellee's skull. Dr. Yost had given a detailed statement of appellee's condition for two months after he had received the injury. A hypothetical question, involving the facts as stated by him, was propounded to Dr. Taylor, and upon that he was allowed to give his opinion as to the probable results of the injuries. The testimony of Dr. Yost as to appellee's condition at the time he attended and treated him was competent evidence in the case, and hence it was competent to embody the facts so given in a hypothetical question to Dr. Taylor. Here, again, the testimony of Dr. Taylor was competent, although it might have been of more weight and importance had it been based upon a hypothetical question embodying the facts as to appellee's condition at the time of the trial.

With a description of the locality, the height of the bridge, and a statement that no danger signals were kept at the bridge, John B. Cooper was allowed to state that, prior to the injury

to appellee, three persons, giving their names, being upon the top of moving trains, were injured and crippled by coming in contact with the bridge, some of whom died from the effects of the injuries.

There is some conflict in the authorities, but under our cases, supported by many others, the evidence was competent as tending to show notice on the part of the railway company that the bridge was dangerous. It would not be profitable here to do more than cite the cases: See *City of Delphi v. Lowery*, 74 Ind. 520, 523; 39 Am. Rep. 98, and cases there cited; *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264; 54 Am. Rep. 312; *City of Fort Wayne v. Coombs*, *supra*.

The arguments by appellant's counsel upon the instructions given and refused are elaborate, and such as to challenge careful consideration, were the instruction in the record. We are met, however, with the contention on the part of appellee's counsel that the instructions are not in the record, for the reason that the record contains no evidence that they were ever filed. They are not embodied in a bill of exceptions. The clerk has copied the instructions into the transcript, but, as contended by appellee's counsel, there is nothing to show that they were ever filed, and hence cannot be regarded as a part of the record. As said in the case of *O'Donald v. Constant*, 82 Ind. 212, "the transcript contains no copy of the clerk's notation of the filing, nor any recital that they were filed." Not being a part of the record, the instructions found in the transcript cannot be considered by this court. To bring instructions into the record without a bill of exceptions, the statute imperatively requires that they shall be signed by the judge, and filed. That they must be thus filed is a rule of practice established by the legislature, which this court could not change if such a change were desired: See R. S., sec. 533, clause 6; *Supreme Lodge Knights of Honor v. Johnson*, 78 Ind. 110; *Elliott v. Russell*, 92 Id. 526, and cases there cited; *Olds v. Deckman*, 98 Id. 162, and cases there cited; *Landwerlen v. Wheeler*, 106 Id. 523; *Childress v. Callender*, 108 Id. 394; *Fort Wayne etc. R'y Co. v. Beyerle*, 110 Id. 100.

It is further contended by counsel for appellant that the verdict and judgment are not supported by sufficient evidence, and are contrary to law. It may be said that it was possible for appellee, while in the employ of the railway company, to have discovered that the bridge was dangerous. He, however, testified positively that he did not know that it was dangerous,

and the other facts stated by him and other witnesses are not such as to justify this court in holding, as a matter of law, that he was bound to take notice and exercise the necessary precautions, having such notice, to avoid injury.

Nor can this court, considering all of the evidence in the case, say that the judgment for ten thousand dollars is excessive.

Judgment affirmed, with costs.

ON PETITION FOR A REHEARING.

ZOLLARS, J. It was held in the principal opinion that we could not, over appellee's objection, decide the questions made upon the giving and refusal of instructions, for the reason, as then stated, that, although the clerk had copied into the record what purported to be instructions given and refused, there was nothing to show that they had been filed, as required by the statute, in order that they might become a part of the record without a bill of exceptions.

In its petition for a rehearing, appellant's counsel cite us to another portion of the record, where the instructions thus given and refused are embodied in a bill of exceptions. This they should have done in their original briefs, as required by rule 19 of this court.

The question was made in appellee's brief, and in his counsel's statement of points for oral argument, that the instructions were not in the record, for the reasons above stated, and stated in the principal opinion. Appellant's counsel now claim that they met the question thus made in their oral arguments.

If their recollections are correct, ours are at fault. However that may be, as the case is an important one, we give to appellant the benefit of the doubt, and have very carefully examined all of the instructions given and refused, as also the arguments of counsel in relation thereto. The theory of appellant's counsel is, that the railway company was only bound to exercise ordinary care in the construction and maintenance of the bridge, and that the jury should have been so instructed; and further, that if appellee had an opportunity, by the exercise of care, to discover that the bridge was too low to pass under with safety, and remained in the service of the company, he must be held to have voluntarily assumed the risk, and thereby waived all right of action for damages.

Complaint is made that some of the instructions given at

the request of appellee, and upon the court's own motion, do not come up to the standard thus fixed by appellant's counsel, in that they omit the element of ordinary care on the part of appellant in the construction and maintenance of the bridge, and put the case to the jury regardless of the assumption of risk on the part of appellee.

It would be a tedious, and we think unprofitable, task to set out all of the numerous instructions thus objected to, and to extend this opinion in meeting specifically the objections urged. Some of the instructions are somewhat confused, in that the jury were instructed in relation to matters not in issue, either by the pleadings or the proof; but we think that the extraneous matters referred to could in no way have misled the jury to the prejudice of appellant. Some of the instructions given were, perhaps, not as full as they might have been; but it has often been held by this court that it is unnecessary, as it is impracticable, to embody all of the law of the case in one instruction, and that where a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another; and further, that if an instruction contains no erroneous proposition of law as applied to the case, and either party thinks that it is faulty because not full enough, his remedy is to submit additional instructions: *Louisville etc. R'y Co. v. Jones*, 108 Ind. 551, 570, and cases there cited; *Board of Commissioners v. Legg*, 110 Id. 479, 485, and cases there cited; *Wilson v. Trafalgar etc. G. R. Co.*, 93 Id. 287, 291.

And so it has been many times held that all of the instructions given must be considered together, and that if, thus considered, the law was correctly stated in such a manner as to be intelligible, and not confusing to the jury, the judgment will not be reversed by reason of inaccurate statements in any particular instruction: *Louisville etc. R'y Co. v. Jones*, *supra*, and cases there cited; *Cline v. Lindsey*, 110 Ind. 337, and cases there cited; *Rauck v. State*, 110 Id. 384, and cases there cited; *Deig v. Morehead*, 110 Id. 451, and cases there cited.

Leaving out of consideration for the present the seventh instruction given at the request of appellee, the others given at his request and upon the court's own motion, taken together, put the case to the jury substantially upon the theory contended for by appellant's counsel. And in the ten instructions given at the request of appellant's counsel, their theory

was pushed to the utmost limit, and in some instances beyond what reason and the correct rules of the law will justify.

It appears in this case that the brakes which appellee was required to set were on the tops of the cars. It was necessary for him, in getting to them, to pass over the tops of the cars. There are cases which hold that in such a case railway companies are not bound to erect the overhead bridges constructed by them of such a height that brakemen can stand or walk erect upon the tops of the cars without coming in collision with them.

As applied to this case especially, we cannot approve of those rulings. Here the bridge was but four feet and nine inches above the tops of the cars; the brakes were on the tops of the cars, and to get to them, the brakemen were required to pass over the tops of the cars, not only in the daytime, but also in the night-time, and often, doubtless, as in this case, when the night was dark, rainy, and foggy, and when it would be almost, if not quite, impossible for them to know of the proximity of such bridges when called to brakes upon moving trains, even if they had knowledge that such bridges were maintained.

To erect and maintain such bridges under such circumstances is negligence.

Further reflection has strengthened the conviction on our part that this conclusion is fully sustained, both by reason and the better authority.

In addition to the authorities cited in the principal opinion, we cite the following: Shearman and Redfield on Negligence, 4th ed., secs. 198 et seq., and notes and cases there cited; Beach on Contributory Negligence, sec. 134; *Chicago etc. R. R. Co. v. Johnson*, 116 Ill. 206.

And where, as here, the facts are shown without any conflict in the evidence, the court may charge the jury that in the erection and maintenance of the bridge the railway company was guilty of negligence: *Board of Commissioners v. Legg*, 110 Ind. 479, and cases there cited.

In the contract of hiring, an employee assumes all risks ordinarily and naturally incident to the service, but he does not assume the risk of injury from unusual hazards. To say the least, in this case appellee did not, by his contract of hiring, assume the risk of injury from the low bridge, unless he had knowledge of the hazard. The danger from such a

bridge is not a hazard ordinarily and naturally connected with the service. It is not shown that he was informed of the danger, nor that he had knowledge of it when he engaged in the service.

As to his duty to exercise care for his own safety, both in discovering the danger and in avoiding the injury, the jury were fully instructed, and, as we have said, and without being more specific, the rule was pushed beyond what reason and the law will sanction.

It is not easy to determine whether the seventh instruction given at the request of appellee was intended to place appellee's right to recover upon the doctrine of comparative negligence, or upon the ground of willfulness on the part of appellant, in which case negligence on the part of appellee would not defeat his right to recover. Upon either construction, the instruction was erroneous. In the first place, the doctrine of comparative negligence, as held by the Illinois court, and as applied to a case like this, has no place in the rulings of this court; and in the second place, appellant is not charged with willfulness in the complaint.

The error, however, must be regarded as a harmless one, as the jury found, in answer to interrogatories, that appellee was not guilty of negligence. It is therefore apparent that the verdict was not based upon the greater negligence of appellant and the lesser negligence of appellee; nor upon the theory that, although appellee was guilty of negligence, he could yet recover by reason of willfulness on the part of appellant: See *Worley v. Moore*, 97 Ind. 15; *Woolery v. Louisville etc. R'y Co.*, 107 Id. 381; 57 Am. Rep. 114.

As to the eleventh instruction asked by appellant and refused by the court, it is sufficient to say that it does not state the law correctly, and that if it did, the error in refusing it would be a harmless error, as the second instruction so asked and given embodied the substance of it: *Stephenson v. State*, 110 Ind. 358; 59 Am. Rep. 261; *National Benefit Assoc. v. Grauman*, 107 Ind. 288.

And so of instructions 12 and 12½ asked by appellant and refused by the court; without deciding whether, as asked, they stated the law correctly, it is sufficient to say that the substance of them was embodied in other instructions given.

From what is here said, it must not be understood that we intend to indorse in full the theory upon which appellant's

counsel have argued the alleged errors in the giving of instructions as above stated, and as applied to a case like this.

After a careful consideration of all of the questions discussed by counsel, we are satisfied that the record presents no error for which the judgment should be reversed.

The petition for a rehearing is therefore overruled.

EMPLOYEE OF RAILWAY COMPANY HAS A RIGHT TO ASSUME that its bridges and track are so constructed as to render him safe in the discharge of the duties of his employment: *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266, and note 274.

SERVANT ASSUMES ORDINARY RISKS INCIDENT TO EMPLOYMENT: *Wilson v. Winona etc. R. R. Co.*, 37 Minn. 326; 5 Am. St. Rep. 851, and note 854; *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note 592; *Norfolk etc. R'y Co. v. Cottrell*, 83 Va. 512; *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266. But he has a right to rely upon his employer's care, superior knowledge, and judgment, and may rightfully assume that the latter has taken all reasonable precautions to guard him from danger, and will not expose him to unnecessary risk: *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and cases collected in note 264.

RAILROAD COMPANY, FOR INJURIES CAUSED BY BRIDGE, the covering of which is so low as to strike an employee in the discharge of his duties, is answerable to him in damages, if he had no knowledge of its dangerous nature: *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266, and note 274; compare *Baylor v. Delaware etc. R. R. Co.*, 40 N. J. Law, 23; 29 Am. Rep. 208; *Baltimore etc. R. R. Co. v. Stricker*, 51 Md. 47; 34 Am. Rep. 291; *Rains v. St. Louis etc. R. R. Co.*, 71 Mo. 164; 36 Am. Rep. 459; *Pittsburg etc. R. R. Co. v. Sentmeyer*, 92 Pa. St. 276; 37 Am. Rep. 684.

DUTY OF RAILROAD COMPANY TO COVER BRIDGES AND CULVERTS on line of its road within its yards: *Franklin v. Winona etc. R. R. Co.*, 37 Minn. 409; 5 Am. St. Rep. 856.

EVIDENCE THAT SUM OF MONEY WAS OFFERED BY DEFENDANT AS COMPROMISE IS ADMISSIBLE IN FAVOR OF PLAINTIFF, unless the offer, when made, was stated to be confidential or without prejudice: *Brice v. Bauer*, 108 N. Y. 428; 2 Am. St. Rep. 454; but compare *Harrington v. Lincoln*, 4 Gray, 563; 64 Am. Dec. 95. Admission of an independent fact, made during negotiations for compromise, is admissible in evidence against the party making it: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; 82 Am. Dec. 201.

TESTIMONY OF PHYSICIAN AS TO PERMANENCY OF PERSONAL INJURY IS NOT INCOMPETENT in an action for damages for negligently causing such injury: *Buel v. New York Cent. R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271; *Matson v. New York Cent. R. R. Co.*, 35 N. Y. 487; 91 Am. Dec. 67.

NEW YORK, CHICAGO, AND ST. LOUIS RAILWAY
COMPANY v. DOANE.

[115 INDIANA, 435.]

NEGLECTANCE. — DUTY OF RAILROAD COMPANY ENGAGED IN THE TRANSPORTATION OF PASSENGERS, WHETHER BY FREIGHT OR PASSENGER TRAINS, is to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its negligence, and the same liability is incurred for the safety of a passenger in a caboose attached to freight train as for one in a regular passenger-coach, where such passenger has been admitted into the caboose, and has paid his fare for transportation as a passenger.

IT IS DUTY OF RAILROAD COMPANY AS CARRIERS OF PASSENGERS TO PROVIDE SUITABLE STATIONAL ACCOMMODATIONS to enable persons to enter its cars and passengers to safely alight therefrom, and if the train is stopped at some place other than the regular station, and passengers are required to alight, and are injured in consequence, the company is liable to the same extent as if the injury was occasioned by the defectiveness of its own premises.

PASSENGERS ON FREIGHT TRAIN, IF REQUIRED TO LEAVE CAR AT SOME PLACE OTHER THAN STATION, ARE ENTITLED TO CARE AND ATTENTION such as to enable them to properly reach the station, especially so where the place at which they are discharged is inappropriate or inconvenient; such passengers may, under certain circumstances, be discharged at some place other than the station platform.

DUTY AND LIABILITY OF RAILROAD COMPANY TO PASSENGERS. —Train should be stopped at station, but if it stops short of the station or goes beyond, it should be either backed to the station, or the passenger should be notified where and how to alight, and be warned of any attendant danger, and should be given such assistance or instructions as are necessary to assure a safe return to the station-house; and where an injury results to the passenger so required to alight at an unusual place, the company is liable in the absence of fault on the part of the passenger.

J. B. Cohrs, J. S. Frazer, and W. D. Frazer, for the appellant.

J. D. Widaman and J. W. Cook, for the appellee.

NIBLACK, C. J. Notwithstanding some discrepancies between witnesses on certain matters of minor importance, there was evidence in this case very strongly tending to establish the following facts: That, during the year 1853, as well as since that time, the appellant, the New York, Chicago, and St. Louis Railway Company, ran a train of cars, known as a local freight train, daily over its line of road between a point near the city of Chicago, in the state of Illinois, and the city of Fort Wayne, in this state; that it was in the habit of carrying passengers in a caboose attached to the rear end of that train between all the stations on that part of its line of road;

that the appellee, Rebecca Doane, on the eighteenth day of June, 1883, entered the caboose of that train, at a station on the road known as Mentone, for the purpose of being conveyed as a passenger to a station nine or ten miles farther east, called Claypool, and paid to the conductor of the train the amount demanded by him for transportation to the station last named; that there was a depot, or station-house, with a platform forty or fifty feet long attached, on the north side of the road at Claypool; that the train consisted of near, if not quite, thirty cars; that when it reached Claypool, it stopped alongside of the platform, the caboose standing on the track at least several lengths of cars, and probably several hundred feet, west of the platform; that several freight-cars were at the time standing on a switch on the south side of and immediately adjacent to the caboose; that on the north side of the caboose a ditch, containing some water, several feet deep and four or five feet wide, ran along near and parallel with the railway track; that Mrs. Doane was unable to see any safe or convenient way of getting out of or away from the caboose; that there was a plank across the ditch some fifty or sixty feet east of the caboose, over which persons sometimes walked, but the strip of ground between the ditch and the railway track was so narrow as to make it impracticable for her to attempt to reach the plank with her two bundles of baggage, which she was carrying with her; that, being told by one of her fellow-passengers that the train would probably pull up to and let her off at the platform, she remained in the caboose; that at or about the time the train stopped, the conductor and the only brakeman then near it left the caboose without giving Mrs. Doane any directions as to how or when she could safely leave the train, and without offering her any assistance in leaving it; that before leaving the caboose the brakeman announced the name of the station, but from dullness of hearing, or some other cause, she did not hear the announcement; that she was, however, otherwise informed that the train was approaching Claypool; that after the expiration of fifteen or twenty minutes the train proceeded on its way east, without stopping at the platform; that in passing the platform the conductor stepped from it into the caboose, and seeing that Mrs. Doane was still on the train, he climbed on top and gave the necessary signal to have the train stopped; that the train was stopped accordingly on a curve eighty or ninety rods away from but still in sight of the station-house; that Mrs. Doane

thereupon demanded that she should be returned to the station by backing up the train, but the conductor declined to so back up the train, and requested her to get off where the train then was, which, with his assistance, she did, the locality being one with which she was entirely unacquainted; that on her reaching the ground, the conductor either said or did something which impressed her with the belief that she could easily get back to the station by walking on the railway track, and that this was the best route for her to take; that where she left the train there was a wire fence, consisting in part of barbed wires, on both sides of the railway track, running back to a railroad crossing near the station-house; that, seeing no other way open to her, she, with her bundles, started along the track in the direction of the station-house; that she had proceeded only a short distance when she came to a cattle-pit, from which plank fences three or four feet high extended each way to the respective wire fences; that realizing the danger there might be in attempting to pass over the cattle-pit, but failing to observe any means of getting around it, and fearing she might be caught by some other passing train, she stepped upon and started to walk over the cattle-pit, exercising as much care as was consistent with her then excited and very nervous condition; that, when about half-way across the cattle-pit, she fell and broke one of her arms near the wrist, and was otherwise bruised and injured; that, with the assistance of a gentleman who came to her relief, she got back to the station-house, where she received surgical aid and attention; that the injury to her arm had proved to be a very painful and permanent injury; that her wrist had not regained and never would regain its normal condition, her arm being thus left in a maimed and weakened predicament.

It was also shown that somewhere not far from where Mrs. Doane left the train there was a gate on the north side of the road which opened into a private lane running north through a farm; that some distance farther north there was another gate on the west side of the lane which led into an open field; that she might have gone through these two gates and thence through the open field, and by a circuitous route have reached the station-house without walking upon the railway track, but she had no knowledge of the fact that she might get to the station-house in that way, and nothing occurred to direct her attention to the practicability of her getting back by that or any other route outside of the railway track.

A jury returned a verdict in favor of Mrs. Doane, assessing her damages at one thousand dollars, and, over exceptions reserved, judgment was given upon the verdict.

Error is assigned upon the overruling of a demurrer to the complaint, which consisted of two paragraphs, and the refusal of the circuit court to grant a new trial.

In support of the errors assigned, it is sought to be maintained in argument: 1. That upon the facts contained in the complaint, and substantially proven at the trial, Mrs. Doane was guilty of contributory negligence in not leaving the caboose when the train stopped at Claypool, and also in attempting to walk back along the railway track, and over the cattle-pit, after she left the train; 2. That upon the facts as stated, the injury complained of was too remote to constitute a cause of action against the railway company; 3. That the damages assessed were, in any view which ought to be taken of the facts as proven, excessive; 4. That certain instructions given to the jury were erroneous.

A railroad company may refuse to carry passengers on its freight trains, but if it admits a person into a caboose attached to one of its freight trains, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger-coaches.

It is neither expected nor required that a passenger upon a freight train shall be provided with all the comforts and conveniences which are usually afforded passengers on a regular passenger train, but there is, on that account, no diminution in the obligation of those in charge of the freight train to carry its passengers with becoming and all necessary care, and to deliver them safely at or conveniently near their respective places of destination. It is the duty of a railroad company engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its own negligence: 2 Wood on Railway Law, 1121 et seq.; *Ohio etc. R'y Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Ohio etc. R'y Co. v. Dickerson*, 59 Ind. 317.

It is also the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars, and passengers to safely alight when they have accomplished their journey. As pertinent to that duty, Wood on Railroad Law, at section 305, on page 1123, says, and we have no doubt correctly,

that "the trains must be stopped at the station so that passengers can alight upon the platform, and if they are stopped at any other place, and the station is called, so that passengers are required, or have a right to understand that they are required, to stop there, the company is liable for injuries received in leaving such place, to the same extent and upon the same ground that it would be liable for injuries received from the defectiveness of its own premises: *White Water R. R. Co. v. Butler*, 112 Ind. 598.

These general principles apply as well to the carrying of passengers by freight as by passenger trains, subject only to such modifications as are made necessary by the nature of the business in which freight trains may be engaged. Where a freight train is accustomed to discharge its passengers at some place other than the platform, or where it is impracticable for it to reach the platform with its caboose, or other car in which its passengers are carried, it may require passengers to leave its train at some other appropriate and convenient place not connected with the platform. In such an event, however, passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station, and this is especially so where the place at which they are discharged is either inappropriate or inconvenient: *Woolery v. Louisville etc. R'y Co.*, 107 Ind. 381; 57 Am. Rep. 114. Further on, at page 1186, the same author says that "if the train overshoots or stops short of the platform at an unusual place, it is held that the company is bound to assist the passengers to alight, and in any event, in such a case, it would be its duty to either back the train to the station or notify the passengers where and how to alight, and warn them of any dangers incident to alighting at that point; and if, through no fault of the passenger, he is injured by alighting at that point, or in getting from there to the station or highway, the company is liable therefor."

Applying these principles to the facts of this case, the railway company failed in its duty in not either stopping the caboose at the platform at Claypool, or assisting Mrs. Doane to alight from the train when it stopped west of that place, and to reach the station in safety. Under all the circumstances, she was justified in not leaving the caboose where it stopped, as well as in inferring that it would be pulled up to the platform before leaving the station. It also failed to perform a plain and very urgent duty when it neglected to

either back its train to a convenient point near the station, or to give her such assistance or instructions as were necessary to assure her safe return to the station-house after it had carried her beyond her place of destination. The duty of a railroad company as a common carrier of passengers is not fully performed until it delivers its passenger in proper condition at the station to which he has paid his fare.

Mrs. Doane was not guilty of negligence in failing to discover some gates leading into private inclosures, and into an open and remote field, through which she might have returned to the station by an unmarked and circuitous route. It was, under the circumstances, not only natural, but reasonable, aside from any directions or intimations which the conductor may have given her, that she should have attempted to follow the railway track back to the station-house. Until she reached that point, she was still, constructively, a passenger on the railway train, and had a right to rely upon any information or directions which she may have received from the conductor: See 2 Wood on Railway Law, 1124-1126.

Nor was Mrs. Doane guilty of contributory negligence in her effort to walk over the cattle-pit. It was important to her that she should pass that place in some way, and within a reasonable time, and no other practicable method of passing it was apparently open to her.

It is a matter within the common knowledge of all that a person may, by the exercise of a high degree of care, ordinarily walk with safety over a cattle-pit. But a cattle-pit is not a suitable place to compel a passenger to walk over to reach the end of his journey, and it was negligence on the part of the railway company to place her in a position which seemingly required her to incur the hazard of walking upon such a place. It is an old rule that where one person places another in such a situation that the latter must adopt a perilous alternative, the former is responsible for the consequences: *Jones v. Boyce*, 1 Stark. 493.

A practical application of this rule, in aid of the general principles previously announced as above, leads us to the further conclusion that the injuries to Mrs. Doane were proximately caused by the negligence of the railway company. This view is fully sustained by the cases of *Cincinnati etc. R. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179, and *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168.

Nothing is shown from which we can infer that the dam-

ages were excessive. Notwithstanding Mrs. Doane had, at the time of her injuries, passed the meridian of life, the maiming and permanent disabling of her arm was no trivial matter to her. She thereby became very materially less able to earn her own living (which she had been accustomed to do) for the rest of her life. The amount she recovered impresses us as a very moderate compensation for the injuries for which she sued.

Objections are specifically made to some of the instructions given to the jury, but none of the instructions complained of are inconsistent with the legal principles we have applied to the evidence, and hence what we have already said practically disposes of all the questions made upon the instructions. Having in view the same legal principles, the demurrer to the complaint was rightly overruled.

The judgment is affirmed, with costs.

DEGREE OF CARE REQUIRED OF COMMON CARRIER OF PASSENGERS: *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9; 5 Am. St. Rep. 483, and note 490; *City etc. R'y v. Findley*, 76 Ga. 311.

RAILROAD COMPANIES, AS SUCH, MUST PROVIDE REASONABLE STATIONAL ACCOMMODATIONS and safeguards where they usually take on and put out passengers: *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649; 4 Am. St. Rep. 231, and note 238; *Little Rock etc. R'y Co. v. Cavenesse*, 48 Ark. 106.

PASSENGER ON FREIGHT TRAIN, WITH KNOWLEDGE OF RISKS AND INCONVENIENCES INCIDENTAL THERETO, IS BOUND to be more careful in guarding against injury than he would be in traveling upon ordinary passenger trains: *Wallace v. Western etc. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346; and see *Central R. R. v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31, and note 39.

THOUGH RAILROAD-CAR IS NOT OPERATED TO CARRY PASSENGERS, yet if a person rides therein at the invitation of the servants in charge thereof, such car must be operated in a manner suggested by due care and caution for the safety of passengers: *Lake Shore etc. R'y Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510, and note 523. Passenger riding upon freight train by permission of the conductor, without notice that his so riding is against the rules of the company, is entitled to same rights as if he were riding on a passenger train; and a passenger received on a freight train which habitually carried passengers is entitled to same degree of the care as passengers on regular trains, except that he acquiesces in the usual incidents and conduct of such train managed by prudent, competent men: *McGee v. Missouri Pacific R'y Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note 712.

PASSENGER HAS A RIGHT TO BE DISCHARGED AT THE REGULAR DEPOT of the carrier, and if ejected at another place, the carrier is liable: *White Water etc. R'y Co. v. Butler*, 112 Ind. 598; *Alabama etc. R'y Co. v. Wilkinson*, 77 Ga. 75; *St. Louis etc. R'y v. Person*, 49 Ark. 182. Trains must stop at advertised stations: Note to *Atchison etc. R'y Co. v. Gants*, 5 Am. St. Rep. 794; but the passenger must inform himself whether the train does actually stop at his station under the rules of the company: *Atchison etc. R'y Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v. GUYTON.

[115 INDIANA, 450.]

WHILE RAILROAD COMPANY IN RELATION TO A BRAKEMAN IS NOT BOUND TO GUARANTEE THE ABSOLUTE FITNESS OF CONDUCTOR, yet in employing him company must exercise a degree of care commensurate with the responsibilities of the position, and in case peculiar fitness is required, or special qualifications demanded for the service to be performed, it is then the company's duty to institute inquiries relative to conductor's fitness to be intrusted with the service, unless it is assured by his previous like service of his competency for such position.

EMPLOYER'S LIABILITY TO CO-EMPLOYEE. — In case employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, employer will be liable to co-employee whose injury results proximately from lack of qualification of fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with employer to obtain notice.

NEGLIGENCE — EVIDENCE OF CHARACTER AND EXTENT OF INJURY IN ACTION FOR DAMAGES. — In such action, for the purpose of showing the character of his injury and the nature and intensity of his suffering, plaintiff may show, after stating how accident occurred and the manner and extent of his injury, that after he had extricated himself from the collision causing the injury, he had proceeded in his disabled condition about one quarter of a mile along the track to flag a train, and prevent its running into the wreck; that he had so done believing it to be his duty as brakeman; that in doing such act he had suffered great pain, and after flagging the train, became unconscious, and remained so till the next day.

WHERE EXTRA-PROFESSIONAL STATEMENTS ARE MADE BY COUNSEL IN ADDRESSING JURY, there is no error if matter is set right by court in such manner that no harm could have resulted.

INSTRUCTIONS SHOULD STATE LEGAL PRINCIPLES APPLICABLE TO THE FACTS OF THE CASE, AND NOT MERE GENERAL RULES OF POLICY which may or may not be wise and proper in the conduct of a particular business.

INSTRUCTIONS — INCOMPETENCE OF EMPLOYEE. — It is not error to refuse instruction which in effect limits evidence of specific acts of incompetency of employee to purpose of showing due care in selecting and retaining such employee, and also limits the same to purpose of bringing notice of incompetence to employer.

IT IS NO ERROR TO REFUSE INSTRUCTION when there is no evidence to which the same is applicable.

J. E. Iglehart and E. Taylor, for the appellant.

A. Gilchrist, C. A. De Bruler, and D. B. Kumler, for the appellee.

MITCHELL, C. J. Guyton was severely injured in a collision which occurred on the appellant railway company's road, on the twentieth day of August, 1882, while serving in the capa-

city of brakeman on one of the company's trains. He brought an action to recover damages for the injuries sustained, and recovered a judgment in the Gibson circuit court, from which this appeal is prosecuted.

His case proceeded upon the theory that the collision resulted from the incompetency of Charles Stice, the conductor, who had control of the train upon which the plaintiff was at the time employed as brakeman, and that the liability of the company grew out of its failure to exercise proper care in the selection of Conductor Stice, whose alleged incapacity resulted in the collision.

There are certain undisputed facts in the case. For instance, there is no dispute but that the railway company put Charles Stice in charge of a wild train, as conductor, to run from Terre Haute to Evansville, on the date above mentioned, and that the train was being run upon telegraphic orders, and not upon schedule time. The plaintiff was a brakeman on this train, which was called the "C. & E. train, special." Some fourteen miles from Vincennes, at a station called Oaktown, Stice received a message from the train dispatcher of the following tenor:—

"C. & E. Train, Special:—

"Run to Vincennes freight station regardless second section train twenty (20), and to Smith's regardless eighteen (18).
"C. J. H."

Smith's is a station between Oaktown and Vincennes. It is conceded that the meaning of the dispatch, as it would or should have been understood by a competent conductor, in connection with the schedule for regular trains, with which train dispatchers assume conductors are familiar, was, that Stice should run his train to Smith's, and wait there until No. 18, a schedule train, and until the first section of No. 20, another schedule train, should pass, and then run to Vincennes, regardless of the second section of train 20. Instead of properly interpreting and executing the order, which is shown to have been correctly given, the conductor ran his train to Smith's, waited until No. 18 passed, and then, although it was within a few minutes of the regular schedule time of No. 20, started out with his wild train, under the mistaken impression that he was to run to Vincennes regardless of train 20. The result was a collision between the wild train and the first section of 20, which was on its regular time, within a few miles of Smith's.

The evidence tends to show that Stice had been in the service of the company as brakeman for a period of six or seven years prior to the accident, and that he had been promoted to the position of freight conductor within a period of less than a month before the collision. The testimony preponderates strongly — we may say overwhelmingly — in favor of the general good character, competency, and skill of the conductor while serving in the capacity of brakeman, and of his general qualification to act as conductor of a freight train. He testified that he understood the order above set out, and that his pulling out his train in disobedience of it was the result of thoughtlessness and a mistake.

There was some testimony, however, from which the jury may have found that he was not possessed of sufficient familiarity with the time-cards, and with the technical language of train orders, and was not sufficiently quick of apprehension to be able to construe and interpret an order in connection with a time-card so as to be competent to act as the conductor of a wild train.

In view of the fact that Stice had been promoted to the position of conductor but recently before the accident, and that more than ordinary vigilance and aptitude were required for the control and safe management of trains such as the one he was intrusted with, and in view of the further fact that there is good evidence which tends to show that, contrary to the requirements of the general rules of the company, Stice had been assigned to duty as a conductor without the usual inquiry or examination in respect to his qualifications, we are constrained to hold that the evidence tends to support what the jury must have found, viz., that Stice was incompetent to act as conductor of a wild train, and that the railroad company was remiss in its duty in selecting him for that service.

While the railroad company, in relation to the plaintiff, was not bound to guarantee the absolute fitness of the conductor, it was its duty, nevertheless, to exercise reasonable and ordinary diligence, having respect for the exigencies of the particular service required, to the end that it might ascertain the qualification and competency of the conductor, and whether or not he was fit to be intrusted with the responsible station to which he was assigned: *Wabash R'y Co. v. McDaniels*, 107 U. S. 454; *Patterson on Railway Accident Law*, 313.

In employing its subordinates, it was the duty of the company to exercise a degree of care commensurate with the responsibilities of the position in which they were to be placed, and with the consequences which might ensue from incompetence or unskillfulness on the part of those employed. In case peculiar fitness was required or special qualifications demanded for the service to be performed, unless it was assured by the previous like service of the conductor of his fitness, the duty of the company required it to institute affirmative inquiries in order to ascertain his qualification in that regard.

In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee whose injury results proximately from the lack of qualification of the fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice: *Pennsylvania Co. v. Roney*, 89 Ind. 453; 46 Am. Rep. 173; *Lake Shore etc. R'y Co. v. Stupak*, 108 Ind. 1; *Pittsburgh etc. R'y Co. v. Ruby*, 38 Id. 294; 10 Am. Rep. 111; *Chapman v. Erie etc. R'y Co.*, 55 N. Y. 579; *Mann v. President etc.*, 91 Id. 495; *Baulec v. New York etc. R. R. Co.*, 59 Id. 356; 17 Am. Rep. 325.

It may be conceded that the evidence in the record fully establishes the fact that Stice had been for years a faithful, vigilant, and competent brakeman, and that he had fairly earned his recent promotion to the position of freight conductor by long and diligent service for the company; and the idea is not to be tolerated that the law will pronounce a person who is shown to be qualified by years of efficient service incompetent because of a single mistake or act of forgetfulness. The fact cannot, however, be disguised that a single act, with the circumstances surrounding it, where the consequences are so overwhelming as the bringing of two trains of cars, running at a high rate of speed, into collision, on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned.

It should be remembered that Stice had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without

more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train. These considerations lead us to conclude that we cannot disturb the verdict and judgment on the evidence.

At the trial, the plaintiff, after stating how the accident occurred, and the manner and extent of his injury, was permitted to state, over objection, that as soon as he had extricated himself from the wreck produced by the collision, it occurred to him that a passenger train, designated as No. 5, would be due at that point in a short time, and remembering that as brakeman it was his duty to flag the approaching train, so as to prevent it from running into the wreck, he proceeded, in the disabled and suffering condition in which he described himself, along the track in the direction from which the train was approaching, for the distance of about one fourth of a mile, and flagged the train. He was permitted to state that in getting the flag he had fallen out of the caboose from weakness and loss of blood, and that he suffered great pain in going back to discharge the duty which he felt was incumbent upon him, and that, after flagging the train and entering one of the cars, he fell unconscious, in which condition he remained until the next day. It is objected that this testimony was improperly admitted, and that it could only have been introduced for the purpose of exciting the sympathy of the jury in the plaintiff's behalf, and to induce them to compensate him for what might be considered a praiseworthy act, instead of compensating him for the injuries resulting from the collision. The testimony was competent. It was admissible, not because the act of flagging the train, however meritorious that was, could be considered by the jury in fixing the amount of compensation, but because the plaintiff was entitled to recover, not only for the permanent injury sustained, but for the physical pain and mental suffering occasioned by the injury. He was entitled to communicate to the jury the character and extent of his injury, and the nature and intensity of the suffering resulting therefrom. If the plaintiff had voluntarily walked a quarter of a mile, or any other distance, immediately after receiving the injury, and, after enduring great suffering, had been taken up by a passing train, and had thereupon become unconscious from pain, exhaustion, and loss of blood resulting from the injury, it cannot be doubted that the facts might have been stated.

The facts following immediately in connection with the injury were none the less admissible because the plaintiff was impelled to exert himself by a high sense of duty to those on the approaching train. As brakeman upon the wrecked train, it was the plaintiff's duty, as it appeared to him under the circumstances, to flag the oncoming passenger train, and prevent the destruction of human life which might have followed had no warning been given. This was the highest conception of the duty of a brakeman. That the plaintiff had the courage and manliness to perform it regardless of his own suffering is to be spoken of in commendation and praise.

Some other rulings of the court relating to the admission of evidence upon matters of minor importance are the subjects of criticism. We have examined the questions, and without delaying to state them in detail, we have been unable to discover any error in that connection. So in respect to certain alleged extra-professional statements made by counsel in addressing the jury of which the appellant complains, it is only necessary to say, if the legitimate privileges of debate were violated, the matter was set right by the court in such manner as that no harm could have resulted.

The objections to the instructions given by the court upon the request of the plaintiff below are not of sufficient importance, nor are they presented in such a manner, as to require that they be separately stated and commented upon. A careful examination fails to disclose any valid objection to those complained of.

The appellant complains on account of the refusal of the court to give the following instruction: "It is the part of wisdom for railroad corporations to take men employed by them from inferior positions and place them in higher ones, as they thus hold out the highest inducement to those in their employ to become skillful and faithful in the performance of their duties. The company has the means of ascertaining accurately the habits and character of its men, and to fill all vacancies with those who are known to be skillful and deserving."

As a statement of the general policy proper to be observed by railroad corporations in respect to the advancement of their employees, the instruction asked was certainly, so far as we are advised, unobjectionable; but the instances are rare in which it is proper for a court to declare, as matter of law, whether or not a certain policy, as applied to the management

of a particular business, is wise or unwise. These are questions of fact for the jury, rather than questions of law for the court: *Unruh v. State*, 105 Ind. 117.

Instructions should state legal principles applicable to the facts of the case, and not mere general rules of policy which may or may not be wise and proper in the conduct of a particular business: *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63.

The following instruction was also asked and refused: "Any evidence of the plaintiff tending to show a specific act of incompetence on the part of Stice, conductor, if there is any such evidence, is only admissible for the purpose of showing that the company had not exercised due care, prudence, and caution in the employment of or retaining in service of a careful, prudent, and skillful conductor, and to bring notice to the defendant of incompetence."

While a specific act or mistake will not necessarily establish incompetence, as has already been remarked, a single act may be of such a character, and may involve such consequences, as, with the surrounding circumstances, to indicate want of qualification on the part of the actor. Such acts are usually resorted to by witnesses as a basis for an opinion as to the qualification of the person whose competency for a particular service is in question. In such cases, the acts, with the accompanying evidence, are proper to be considered by the jury: *Pittsburgh etc. Ry Co. v. Ruby*, *supra*.

The court also refused to charge that "specific acts of negligence are not competent to show that the conductor, Stice, was guilty of negligence in producing the collision, as charged in the complaint, if it were on a different occasion."

While the foregoing is undoubtedly a correct statement of the law, when considered in connection with evidence to which it is applicable, the refusal of the court in the present case is not available to the appellant.

The appellant's theory, and that of its witnesses, was that the collision was attributable, not to the incompetency of Stice, but to his neglect. The appellant, impliedly at least, admitted the negligence of Stice, but insisted that he was not incompetent. There was no evidence to which the instruction was applicable.

We have discovered no error justifying a reversal. The judgment is affirmed, with costs.

RAILROAD COMPANY'S DUTY TO ITS EMPLOYEES REQUIRES IT to use due diligence and care in selecting competent and skillful co-employees: *Bushby v. New York etc. R. R. Co.*, 107 N. Y. 374; 1 Am. St. Rep. 844; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; 8 Am. Rep. 126; *Harper v. Indianapolis etc. R. R. Co.*, 47 Mo. 567; 4 Am. Rep. 353; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206, and note 214; *O'Donnell v. A. V. R. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336.

ON QUESTION OF NEGLIGENCE OF MASTER IN RETAINING SERVANT IN HIS EMPLOYMENT, specific acts of neglect of the servant are evidence: *Baulee v. New York etc. R. R. Co.*, 59 N. Y. 356; 17 Am. Rep. 325; *Pittsburg etc. R. R. Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111.

ADMISSIBILITY OF STATEMENTS BY INJURED PARTY as to his complaints and effect of his injuries: See *Central Railroad v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31, and note 39; *Owens v. Kansas City etc. R'y Co.*, 95 Mo. 169; 6 Am. St. Rep. 39.

SERVANT KNOWING HIS FELLOW-SERVANT TO BE NEGLIGENT and reckless, and unfit for his employment, will be held, in the absence of anything to the contrary, to have assumed the extra hazard as to his fellow-servant, and to have waived his right to redress against the master in case of injury arising to him from that servant's reckless act: *Porter v. Western N. C. R. R. Co.*, 97 N. C. 66; 2 Am. St. Rep. 272.

AM. ST. REP., VOL. VII.—20

CASES
IN THE
SUPREME COURT
OF
IOWA.

TEABOUT v. JAFFRAY AND COMPANY.

[74 IOWA, 29.]

REDEMPTION OF REAL ESTATE FROM EXECUTION SALE — INJUNCTION AGAINST SHERIFF — FRAUDULENT CONVEYANCE. — Statutory right of redemption can be exercised only within the period and in the manner prescribed by the statute creating it. But this right is entirely distinct from the purely equitable right which a fraudulent grantee has to discharge a lien upon real estate existing by virtue of a judgment obtained by the creditors of the fraudulent grantor against the latter. And a court of equity will interfere by injunction to prevent the sheriff, at the expiration of the year allowed by statute to redeem, from executing a deed under the execution sale of the land, if the fraudulent grantee's right to discharge the judgment creditor's lien upon the land depends upon an action which he is contesting in good faith, and which action has not been determined when the deed is about to be made; but upon its determination and the judgment being affirmed the grantee may then discharge the lien, and the decree in effect makes the injunction perpetual.

E. E. Cooley and W. E. Akers, for the appellants.

L. Bullis and C. Wellington, for the appellee.

REED, J. On the sixth day of September, 1881, John Roper and Company recovered a judgment against Francis Teabout for about sixteen hundred dollars. At that time Emily Teabout, who was the wife of Francis Teabout, held the legal title to a farm in Winnesheik County, which was conveyed to her several years before by said Francis. Roper and Company instituted a suit in equity to subject the property to their judgment, alleging that the conveyance under which Emily Teabout held it was executed for the purpose of fraudulently

covering the property from the creditors of the husband. Emily Teabout was served with the original notice in the action, but she neglected to appear or answer therein, and on the 17th of January, 1882, judgment was entered against her by default, in accordance with the prayer of the petition. On the fifth day of August, 1882, the property was sold on execution by the sheriff for the satisfaction of the judgment, and Roper and Company bid it in for the amount of their judgment and costs, and a certificate of purchase was issued to them by the sheriff. In October, 1882, Mrs. Teabout filed her petition, alleging that she was prevented by unavoidable casualty and misfortune from making her defense in the equity case of Roper and Company against her, and praying that the judgment rendered therein be set aside, and that she be permitted to make her defense. That application came on for hearing at the January term, 1883, of the circuit court, the original judgment having been rendered in that court, and on the hearing she was denied relief. From that she appealed to this court, but at the December term, 1883, the judgment was affirmed: See 62 Iowa, 603. While the appeal was pending she instituted this suit, alleging in her petition that unless the sheriff, who was made a party, was enjoined from so doing, he would, on the expiration of the year allowed by the statute within which the property might be redeemed from the sale, execute a deed to the purchaser; and a temporary injunction was allowed by the judge. Soon after the order of affirmation was entered in this court, she paid to the clerk of the circuit court the amount which he represented was necessary to effect the redemption of the property from the sale, and he issued to her a certificate. It transpired afterwards, however, that the clerk had made a mistake in his computation, and that the amount paid was not sufficient; but when this discovery was made she paid an additional sum, which, with that formerly paid, was sufficient to satisfy the money judgment against her husband. Pending the action, Mrs. Teabout executed a conveyance of the property to Angie Valleau, and she was substituted as plaintiff. Roper and Company also assigned the certificate of purchase to E. S. Jaffray and Company, and they intervened in the action. The judgment of the district court perpetuates the injunction.

It will be observed that the payment of the money was made after the expiration of one year from the date of the sale. Plaintiff has proceeded upon the theory that the right

remaining to her after the sale of the premises was the statutory right of redemption, and that, owing to the peculiar circumstances of the case, she is in equity entitled to an extension of the time within which to exercise the right. While we are able to reach the result which plaintiff seeks to attain, we do not adopt that theory as to the nature of her right. The rule undoubtedly is, that a statutory right of redemption can be exercised only within the period and in the manner prescribed by the statute creating it.

It is true that this court has in two cases permitted the right to be exercised after the expiration of the period; but, as is apparent from the opinions, that result was reached after much hesitancy, and the holding is based upon the special facts of the cases: *Hughes v. Feeter*, 23 Iowa, 547; *Wickersham v. Reeves*, 1 Id. 413. These cases cannot be regarded as establishing a rule upon the subject, but are exceptional. The provisions of the statute with reference to the redemption of real estate from execution sale have relation to cases in which the property of the defendant has been sold in satisfaction of a judgment against him. Perhaps they would apply to the case of a purchaser who had taken the property subject to the lien of a judgment; but we need not inquire as to that in the present case. The judgment for the satisfaction of which the property in question was sold was against plaintiff's grantor, and he alone was liable for the debt. Neither was it a lien on the property when she acquired the title, for it was not rendered until long after that. The property, however, was subjected to the satisfaction of the judgment by the decree in the equity action. The effect of that decree was to create a lien upon the property for the security of the money judgment: *Howland v. Knox*, 59 Iowa, 46. The conveyance to plaintiff, although fraudulent as to creditors, was valid as between her and her husband: *Wright v. Howell*, 35 Id. 288; *Mellen v. Ames*, 39 Id. 283. Plaintiff, then, was the owner of the property, but she held it subject to the lien created by the decree; and she had the right, for the purpose of protecting her interest, to discharge the lien. But that right is quite distinct from the right of redemption created by code, section 3102. It is a purely equitable right, and it continues until her interest in the property is divested by a sale and deed. But when the sale was made she was contesting in good faith, and in the manner prescribed by law, the right of the judgment creditor to subject her property to the satisfaction of his

judgment. He had his decree establishing his lien, it is true, but she was seeking by a proper and timely proceeding to set it aside; and until that proceeding should be terminated, it could not be determined that she would ever have occasion to exercise the equitable right to discharge the lien, for it could not be sooner known that the decree establishing it would be maintained. The question whether it would be necessary for her to exercise the right depended upon whether she would succeed in her application to set the decree aside, and she could not be required to exercise it until that was determined; and a court of equity will ordinarily interfere by injunction to preserve or continue a right until the termination of the litigation upon the result of which the right depends. The money was properly paid to the clerk of the court in which the judgment was rendered. Money paid in satisfaction of a judgment may always be paid to that officer. The failure to pay the full amount in the first instance was the result of an honest mistake, and as plaintiff made good the deficiency as soon as the mistake was discovered, her rights will not be defeated thereby. We are of the opinion that the result reached by the district court is right, and the judgment will be affirmed.

RIGHT TO REDEEM LAND SOLD UNDER EXECUTION IS LEGAL RIGHT created by and depending upon statute, and cannot be enforced unless the terms prescribed by statute be strictly pursued: *Ewing v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765, and cases collected in note 771; *Wilson v. Schneider*, 124 Ill. 628. One who fails to redeem within the time limited by statute through culpable negligence or ignorance of the law has no claim to relief in equity: *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133.

PURCHASER OF LAND ON EXECUTION SALE ACQUIRES NO INTEREST BEFORE EXPIRATION of the time for redemption which is subject to sale on execution against him: *Bowman v. People*, 82 Ill. 246; 25 Am. Rep. 316.

WHERE THE EQUITY OF REDEMPTION IN LAND SOLD UNDER EXECUTION has been levied upon and sold, neither the execution defendant nor the purchaser of the equity can redeem after the expiration of one year from date of first sale. Hence, where, at the expiration of the year, the equity has been levied on, it cannot be sold, because the subject of levy is no longer in existence: *Bethel v. Smith*, 83 Ky. 84. And where there have been two successive execution sales within one year against the same defendant, he is entitled to redeem from both, but must do so within one year from date of first sale: *Harrison v. Wilmering*, 72 Iowa, 727.

COENEN v. STAUB.

[74 IOWA, 32.]

MECHANIC'S LIEN FOR CONSTRUCTING SIDEWALK IN FRONT OF A LOT is not enforceable against such lot under section 3120, code of Iowa.

Beard and Myerly, for the appellants.

Fremont Benjamin, for the appellees.

REED, J. Plaintiffs seek to enforce a lien for the materials against the lot in front of which the sidewalk was constructed, and the only question in the case is, whether they are entitled to that remedy. The statute under which the remedy is claimed (Code, sec. 2130) is as follows: "Every mechanic or other person who shall do any labor upon, or furnish any material, machinery, or fixtures for, any building, erection, or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter, shall have, for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished." Under this provision, the lien attaches to the building, erection, or improvement, and to the land upon which it is situated. The sidewalk is not situated upon the lot sought to be charged, but in the street on which it fronts. It is not an improvement upon or of the lot, nor was it made for the benefit of the owner, but of the public, and was constructed by the owner, as we presume, in obedience to some requirement of the town government. Under provisions of the statute, many street improvements in incorporated towns and cities may be made at the cost of the owners of the abutting property. Streets may be reduced, or filled to grade and paved, and sewers and sidewalks may be constructed therein, and when the work is done by the city, the cost may be taxed, by special assessment, upon the abutting property, or the property owners may be required to do the work in front of their respective properties. But however it may be done, the work is a public rather than private improvement; and the law does not afford the mechanic or material-man who does such work or furnishes material therefor, under

contract with the owner of the abutting property, a lien therefor upon the property.

Affirmed.

LIEN OF MECHANICS AND MATERIAL-MEN IS PURELY CREATURE OF STATUTES, and such statutes, being remedial, must be liberally construed: *White Lumber Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262.

MECHANIC'S LIEN WILL BE RESTRICTED to the property on which he has the right to a lien, though he may assert a claim to a lien on other property: *Lyon v. Logan*, 68 Tex. 521; 2 Am. St. Rep. 511.

MINNESOTA STATUTE DOES NOT AUTHORIZE MECHANIC'S LIEN FOR FILLING IN AND GRADING EARTH ABOUT BUILDINGS already erected, where the work does not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land: *Pratt v. Duncan*, 36 Minn. 545; 1 Am. St. Rep. 697, and see cases collected in note at foot of page; *Board of Commissioners v. O'Connór*, 86 Ind. 531; 44 Am. Rep. 338; *Drew v. Mason*, 81 Ill. 498; 25 Am. Rep. 288; *Brown v. Wyman*, 56 Iowa, 452; 41 Am. Rep. 117.

SHIVELY v. CEDAR RAPIDS, IOWA FALLS, AND NORTHWESTERN RAILWAY COMPANY.

[74 Iowa, 169.]

IF INSTRUCTIONS, TAKEN AS A WHOLE, ARE CORRECT, it constitutes no ground for reversal that a portion of them taken separately are erroneous.

MEASURE OF DAMAGES. — WHERE THE NUISANCE IS NOT NECESSARILY A PERMANENT ONE, but may be abated at any time by the defendants, the measure of damages is a depreciation of rental value while the nuisance existed, in a case where the alleged nuisance was the rendering of plaintiff's dwelling-house uninhabitable by reason of foul and unhealthy odors emitted from defendants' stock-yards.

IT IS NO DEFENSE THAT NUISANCE WAS NECESSARY TO THE OPERATION OF RAILROAD BY DEFENDANTS, in a case where the alleged injury was to plaintiff's dwelling-house, caused by the proximity to stock-yards, and the odors complained of were unwholesome, threatening the health of the inmates of the house, it not being shown that they were unavoidable, or that the yards might not have been located at another place on the road with equal convenience to the road and its patrons.

Van Wagenen and McMillen, and S. K. Tracy, for the appellants.

J. M. Parsons, for the appellee.

ROBINSON, J. The plaintiff alleges that he is the owner of a house and lot in the town of Rock Rapids, which he occupies as a home; that in September or October, 1886, the defendants built, and have since maintained, within sixty feet of

said lot, stock-yards for the use of shippers over the road of defendants; that said stock-yards have become foul and a nuisance, emitting foul and unhealthy odors, so as to render plaintiff's house almost uninhabitable, and almost totally destroyed its value, greatly inconveniencing and endangering the health of plaintiff and his family.

1. The fourth paragraph of the charge of the court to the jury is as follows: "If you find for plaintiff, then you will proceed to assess and determine from the evidence the amount of damages he is entitled to recover in this action, the measure of which will be the loss or diminution of the fair rental value of the property in question from the time you find said nuisance was established up to the commencement of this suit, and find for the plaintiff in such sum." Appellants complain of this portion of the charge, on the ground that it assumes that the stock-yards were in fact a nuisance, instead of leaving the question of their character to the determination of the jury. There would be ground for this complaint did not the preceding portions of the charge properly instruct the jury as to what would constitute a nuisance, and direct them to find for the defendants if a nuisance had not been proven. Taking the charge as a whole, we do not think the jury could have been misled by the paragraph under consideration.

2. The appellants insist that the paragraph of the charge quoted did not properly instruct the jury as to the measure of plaintiff's damages. The alleged nuisance is not necessarily a permanent one, but may be abated at any time by the defendants. Plaintiff would not have been entitled to recover the full value of his property even though he had shown that it was valueless while the nuisance existed, because it might prove to be but temporary, hence the depreciation in rental value under the facts in this case was the proper measure of plaintiff's recovery: *Loughran v. City of Des Moines*, 72 Iowa, 382. We think the relief granted was within the prayer of the petition.

3. After the evidence was submitted, the defendants asked the court to instruct the jury to return a verdict for the defendants. This was refused. Appellants insist that this ruling was erroneous, for the reason that the yards were necessary to the operation of defendants' roads, and the odors of which plaintiff complains could not be prevented, but were necessary even where the yards were properly conducted. The case of *Dunsmore v. Cent. Iowa R'y Co.*, 72 Iowa, 182, is relied upon as

sustaining this position. We do not think that is a case in point. In that case no complaint was made that the alleged nuisance was improperly operated, nor that it was injurious to health. It was held that the noise, stench, and dust of which complaint was made necessarily attended the proper operation of the road, and that no recovery could be had for the annoyance they occasioned. In this case the odors complained of are not merely an annoyance, but they are unwholesome, threatening the health of the plaintiff and his family. It is not shown that they are unavoidable, nor does it appear that the yards might not have been located at another place where they would have met the necessities of the road and its patrons. As bearing upon this question, see *Shiras v. Olinger*, 50 Iowa, 571; 33 Am. Rep. 138; *Cook v. Benson*, 62 Iowa, 170; *Bushnell v. Robeson*, 62 Id. 541; *Baker v. Bohannan*, 69 Id. 62.

We discover no prejudicial error in any of the matters discussed by counsel for appellants.

Affirmed.

IF INSTRUCTIONS CONSTRUED AS ENTIRETY CORRECTLY EXPRESS the law, they afford no just ground of complaint, even though an isolated and detached clause is in itself an inaccurate or incomplete statement of the law: *Indianapolis etc. R. R. Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; and see *Strohn v. Detroit etc. R. R. Co.*, 23 Wis. 126; 99 Am. Dec. 130, note.

NO ONE CAN SO USE HIS PROPERTY as to create a nuisance, or have property which is a nuisance where it is situated: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184.

LAWFUL AS WELL AS UNLAWFUL BUSINESS MAY BE CARRIED ON so as to prove a nuisance: *Norcross v. Thomas*, 51 Me. 503; 81 Am. Dec. 588; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Burditt v. Swenson*, 17 Tex. 489; 67 Am. Dec. 665; *Pruner v. Pendleton*, 75 Va. 516; 40 Am. Rep. 738; *Hurlbut v. McKone*, 55 Conn. 31; 3 Am. St. Rep. 17.

NUISANCE—MEASURE OF DAMAGES. — Where a nuisance has been maintained which rendered plaintiff's house unwholesome, and caused sickness to his family, the measure of damages is the difference in the rental value of the property before and after the establishment of the nuisance, for the time such nuisance was maintained, together with such additional sum as will compensate for loss of time and expenses caused by sickness in family due to the nuisance: *Loughran v. City of Des Moines*, 72 Iowa, 382.

MILLS v. PENNY.

[74 IOWA, 172.]

POSSESSION IS NOT ADVERSE, AND STATUTE OF LIMITATIONS DOES NOT APPLY, where one takes possession of land and holds the same under belief that it was part of his own section, to which it was adjacent, without any intention of claiming any land other than that included in his own section.

BOUNDARIES — NEW SURVEY WILL NOT PREVAIL AS TO LOCATION OF QUARTER-SECTION CORNERS OVER DIRECT TESTIMONY of witnesses who saw corners as located by the original survey.

EQUITABLE action to quiet title to land. Appeal by defendant from judgment for plaintiff.

Woodward and Cook for the appellant.

Blair and Dunham, and W. H. Norris, for the appellee.

REED, J. Plaintiff is the owner of the southeast quarter and defendant of the northeast quarter of section 27, township 89, range 7. A former owner of the southeast quarter planted a willow hedge on what he claimed was the line between the two tracts. Defendant claims that the true line is forty-three and one half links south of that hedge, and the property in dispute is the strip of ground lying between the hedge and the line as defendant claims it to be. Plaintiff claims: 1. That the hedge is on the true line; and 2. That he, and those under whom he claims, have been in open, actual, and adverse possession of the disputed strip for more than fifteen years, and that consequently his title is established by prescription. With reference to the latter claim, we deem it sufficient to say that the evidence is that possession was taken and held in the belief that the disputed strip was part of the southeast quarter, and without any intention of claiming any part of the other quarter-section; so that if, as matter of fact, the strip was part of the northeast quarter, the possession would not, under the former rulings of this court, be regarded as adverse, and consequently the statute of limitations could not apply: *Grube v. Wells*, 34 Iowa, 148; *Skinner v. Crawford*, 54 Id. 119. We think, however, that a fair preponderance of the evidence shows that the hedge is on the true line. The person who planted it, and who owned the southeast quarter when it was planted, testified that at that time the quarter-section corners on both the east and west lines of the section were standing, and that he staked the line between them and planted the hedge on that line. He is corroborated by another witness, who has lived in the

neighborhood for many years, and who testified that he saw the mound and stake at the east end of the hedge several years after the hedge was planted. These witnesses are not contradicted by any direct testimony. The defendant relies on the fact that the east end of the hedge, as shown by a recent survey, is forty chains and forty-three and one half links north of the southeast corner of the section. But that does not prove that the quarter-section corner was not originally located at the point where the witnesses say they saw it. If the original survey of the land had been absolutely accurate, the line between the southeast corner of the section and the quarter-section corner would have been just forty chains in length. But the common observation is that the lines are seldom found upon a resurvey to be of the exact length required by the instructions under which the original survey was made, or as shown by the field-notes. The apparent discrepancy in this case is not so great as even to raise a suspicion of fraud on the part of the land-owner who would be benefited by it. It may have occurred in the original survey, and the work have been done in a reasonably careful manner.

The judgment, we think, is fully sustained by the evidence. Affirmed.

ADVERSE POSSESSION, NATURE OF TO SET IN OPERATION STATUTE OF LIMITATIONS: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and cases collected in note 74; *Sherin v. Brackett*, 36 Minn. 152; *Scate v. Mills*, 49 Ark. 266.

BOUNDARIES OF LANDS, WHAT CONTROLS: *Wise v. Burton*, 73 Cal. 166; *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718, and cases collected in note 721; *Redmond v. Stepp*, 100 N. C. 212. Evidence respecting: *Emery v. Webster*, 42 Me. 204; 66 Am. Dec. 274; *McAfferty v. Conover*, 7 Ohio St. 99; 70 Am. Dec. 57, and note 61; *Whitney v. Bacon*, 9 Gray, 206; 69 Am. Dec. 281; *Wood v. Foster*, 8 Allen, 24; 85 Am. Dec. 681; *Wood v. Hillard*, 37 Vt. 377; 86 Am. Dec. 716; *Adams v. Blodgett*, 47 N. H. 219; 90 Am. Dec. 569; *Halliday v. Maddox*, 39 Kan. 359; *Davidson v. Arledge*, 97 N. C. 172; *Anderson v. Peterson*, 74 Iowa, 482.

POSSESSION BY ADJOINING OWNERS of land to what is erroneously supposed by each to be the true line between them, neither intending to claim beyond the true line, is not adverse as to either party, and statute of limitations does not operate: *Keen v. Schnedler*, 92 Mo. 516.

STATUTE OF LIMITATIONS is only available to the owner of a junior grant to the extent of his actual possession, where there is conflict between two surveys, which have been patented, and the owner of junior grant has possession of only part of what is in conflict, while owner of elder grant has possession only of what is not in dispute: *Anderson v. Jackson*, 69 Tex. 346.

REED v. DOUGLAS.

[74 IOWA, 244.]

ESTOPPEL. — JUDGMENT QUIETING TITLE is conclusive in favor of plaintiff that he is the absolute owner of the property, and that a tax title then held by the defendant is invalid.

ESTOPPEL. — JUDGMENT QUIETING PLAINTIFF'S TITLE concludes the defendant from asserting a title by him acquired *pendente lite*, and which he might have pleaded in the action, but did not.

Ruby and Wilkin, for the appellant.

J. B. Westfall and V. Wainwright, for the respondent.

REED, J. On the 20th of November, 1871, Hannah J. Stanton acquired title to the property in question by conveyance from David Stanton, her husband. On the 27th of April following, she and her husband executed a mortgage on the property to Dennis and Keyes to secure an indebtedness of \$408.30. Plaintiff afterwards became the owner of that note and mortgage, and in 1876, he brought suit thereon in the Madison circuit court, and recovered a judgment for the amount of the indebtedness, and for the foreclosure of the mortgage. On the 10th of October, 1872, the treasurer of the county executed to John McLeod a tax deed of the premises, under a sale for delinquent taxes, and on the 12th of the same month, McLeod conveyed the premises to Francis Davis. On the 20th of September, 1876, the Stantons executed to plaintiff a quitclaim deed, and on the 12th of December, 1876, Davis executed to him a like conveyance. Those conveyances were intended to cover the property in question, but the description was defective; and on the 10th of February, 1880, Davis executed a second deed, intended to correct the mistake, but the description in that conveyance of the property was also defective. These conveyances were executed in pursuance of an agreement between Stanton and plaintiff, whereby the latter was to accept the premises in satisfaction of the debt secured by the Dennis and Keyes mortgage. On the 15th of September, 1875, Layton Jay recovered a judgment against David Stanton in the circuit court for \$394.33, on which execution issued August 14, 1876, which was levied on the property, and the same was sold at sheriff's sale, on the 27th of September following, to James Tumilty, to whom the sheriff executed a deed November 22, 1877; and on the 24th of February, 1880, Tumilty executed a conveyance to J. R. Thompson, who, on the 8th of March, 1886, gave a warranty

deed to defendant. Davis and Stanton also, on the 26th of January, 1886, executed a quitclaim deed of the premises to Thompson. On the 3d of March, 1877, and the 28th of January, 1879, Thompson also obtained tax deeds of the property, under sales for delinquent taxes. Plaintiff brought an action in the district court against Thompson to cancel those deeds, and quiet in him the title to the property. Judgment was entered in that action on the 27th of February, 1880, quieting plaintiff's title, but establishing a lien on the property for the amount of the taxes paid by Thompson, and providing for a sale on special execution for the satisfaction of the lien. Plaintiff, however, subsequently discharged it by paying the amount found to be due. Defendant alleged that he was an innocent purchaser for value. Also that the agreement between plaintiff and Stanton, under which the conveyance from Davis and Stanton to plaintiff was executed, was, that plaintiff, as part of the consideration, was to pay the Layton Jay judgment against Stanton, and that the deeds were deposited with a third party in escrow until that agreement should be performed; but that plaintiff subsequently obtained possession of them, and asserted title under them, refusing at the same time to perform the agreement. He also alleged that Davis held the title to the property in trust for Stanton, who was the real owner thereof at the time of the execution sale to Tumilty; and, in a cross-petition alleging these facts, he prayed that his title be quieted. Plaintiff, in his reply, pleaded the judgment rendered in the action against Thompson in bar, alleging that defendant is now estopped by that adjudication from either asserting title in himself or denying plaintiff's ownership of the property.

We are of the opinion that the plea of estoppel should be sustained. The relief demanded by plaintiff in the action against Thompson was the setting aside of the tax deeds, and the quieting of his title to the property. His ownership was necessarily drawn in question; for, unless he was the owner, he was entitled to no relief in the action. He alleged in his petition that he was the absolute owner of the property, and that allegation was denied in the answer.

The judgment, then, necessarily determines, not only that the tax deeds were invalid, but that plaintiff was the owner of the property. A judgment operates as an estoppel, not only as to all matters in issue, but as to all points controverted upon which the verdict or finding was rendered: *Cromwell v.*

County of Sac, 94 U. S. 351; *Haight v. City of Keokuk*, 4 Iowa, 199; *Delany v. Reade*, 4 Id. 292; *Shirland v. Union Nat. Bank*, 65 Id. 96. It will be observed that the conveyance from Tumilty to Thompson was executed pending the action, so that the latter could have pleaded the same claim of title in that action which defendant asserts in this. It makes no difference that the conveyance was after the issue was joined, for under our system of pleading he would have been permitted to set up the claim, by proper amendment, at any time before the judgment was entered. Another consideration quite as conclusive of the question grows out of the fact that plaintiff was required by the judgment to pay the amount of the tax which Thompson had paid upon the land. That provision of the judgment was favorable to Thompson, and he has had the benefit of it; and neither he nor his privies will now be permitted to assert a claim which he owned, and might have asserted in the former action, and which, if valid, would not only have defeated any recovery by plaintiff, but would also have prevented the establishment of the right which Thompson secured by the judgment.

Affirmed.

JUDGMENT, CONCLUSIVE AS TO WHAT FACTS: *Burlen v. Shannon*, 99 Mass. 200; 96 Am. Dec. 733; *Lea v. Lea*, 99 Mass. 493; 96 Am. Dec. 772, and extended note 775-788; *Harmon v. Auditor etc.*, 123 Ill. 122; 5 Am. St. Rep. 502.

OPERATION OF JUDGMENT AS ESTOPPEL is not affected by the fact that a motion for a new trial is pending in the action in which it is given: *Young v. Brehe*, 19 Nev. 379; 3 Am. St. Rep. 892.

THE DOCTRINE OF RES JUDICATA has been held in Virginia to apply to all matters which were or might have been raised at the trial, and applies to both the parties to suit and their privies: *Findlay v. Trigg's Adm'r*, 83 Va. 539; *Bradley v. Zehmer*, 82 Id. 685.

THE IMPORTANT POINT IN THE PRINCIPAL CASE is the decision that a title acquired by the defendant after issue joined, and which he does not plead by supplemental answer, must nevertheless be regarded as in issue, and therefore bound by the final judgment in the action. This point did not receive the attention it deserved, and the opinion indicates that the decisions elsewhere made upon the subject were not called to the notice of the court. The conclusion announced was, in our judgment, in conflict both with principle and with authority. The rule that a judgment is conclusive upon all questions which might have been litigated in the action is often asserted in general terms, and its assertion in such terms is misleading. The plaintiff by his complaint tenders certain issues. These the defendant must meet, if he does not choose to have them stand as decided against him. If he takes issue on some, and omits to do so as to others, these latter will be equally concluded by the final judgment in the action, because they were matters

which it was his duty then to litigate, if he ever wished to do so. But the whole litigation take effect as by relation as of the date of the filing of the complaint. While the parties in certain instances may give it a different effect or date by the filing of supplemental pleadings, it cannot be said to be their duty so to do. Hence the failure to file such pleadings is not a waiver of the right in some subsequent action of urging the matters which might have been urged by supplemental pleading in the former action. The utmost that a judgment can be properly regarded as determining is, that the facts alleged in the complaint were true when it was filed. If the defendant afterwards acquires a title from some one who is not a party to the action, he may, at his election, put it in issue by a supplemental answer. But if he does not so put it in issue, it cannot be affected by the final judgment: *People's Savings Bank v. Hodgdon*, 64 Cal. 98; *Valentine v. Mahoney*, 37 Id. 396.

CRANE v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[74 IOWA, 330.]

NEW TRIAL MAY BE GRANTED WHERE VERDICT IS AGAINST INSTRUCTIONS OF COURT. Instructions, whether right or wrong, constitute the law of the case, and it is the duty of the jury to follow them.

MANDAMUS MAY NOT BE MAINTAINED BY PRIVATE CITIZEN TO COMPEL RAILROAD COMPANY TO RELOCATE ITS ROAD. Unless the public interests have been injuriously affected, a private individual cannot insist by *mandamus* that a public right or duty be enforced; it is not sufficient that he has suffered private damage. Under the Iowa code, section 3377, the "order of *mandamus* is granted on the petition of any private party aggrieved."

Callender and Smith, and Barcroft and Bowen, for the appellant.

Hubbard and Dawley, for the appellees.

SEEVERS, C. J. The plaintiff is a resident voter, tax-payer, and property holder of Polk City, in Madison township, Polk County, Iowa, and brings this action for himself and other voters, tax-payers, and property holders in Polk City, and the petition, in substance, states that the defendant, the Des Moines and Minneapolis Railroad Company, was a corporation organized under the laws of Iowa; that the object, as defined by the charter of said corporation, was to construct and operate a railroad from Des Moines to the state line between the states of Iowa and Minnesota; that prior to August, 1870, said line of road was located through Polk County by Polk City; that a tax was voted in said Madison township upon the taxable property therein, to aid in the construction of said

road from Des Moines by Polk City to Ames, in Story County; that said road was constructed and operated by the way of Polk City from Des Moines to Ames, Polk City being a station on its main line between said places; that said company having complied with the conditions upon which the tax was voted, the same, amounting to about seventeen thousand dollars, was collected and paid to said company; that the county of Polk conveyed to said company about fifteen thousand acres of swamp-land belonging to the county, upon the express condition that said railroad should be constructed and operated through and by Polk City; that many citizens of Polk City subscribed and paid for stock in said company upon like conditions; that said road was operated for several years by Polk City as a through-line between said places; that in the year 1879 the defendant, the Chicago and Northwestern Railroad Company, leased and became in possession of all the franchises, privileges, and property of said former company, and of the railroad, and changed the location thereof, and has built and is now operating its main line of road about two miles east of Polk City, to the great damage of the plaintiff and other property owners in Polk City, and that said line is entirely a different line from the one in aid of which taxes were voted; that plaintiff has demanded of the last-named company that it operate the road as it was originally constructed, which the said defendant refuses to do; that plaintiff owns property in Polk City, which has greatly depreciated in value because of such refusal.

The relief asked is, that defendant be compelled to operate the road as it was originally constructed and operated. The answer admits some of the allegations of the petition, and denies others. It is denied that plaintiff or other citizens sustained any damage by the change made. It is alleged that the road constructed by the Des Moines company was a narrow-gauge road, which has been changed to a standard gauge, and that the road as now operated has become part of an extensive system of railroads, and that it has become part of a through-line between Des Moines and St. Paul. It is also alleged that such road is of greater value and of more use and benefit to the plaintiff and other citizens of Polk City than it was as originally constructed; that, under a contract or understanding with thirty-five of the principal tax-payers of Polk City, a change in the location of the road as originally constructed was made, so that the main line thereof is oper-

ated about two miles east of Polk City, but that a broad-gauge road was constructed from Polk City to a point about two miles northeast thereof, where it connected with the main line; and that two passenger trains are run daily from the main line to Polk City on their way from Des Moines to Ames, and two mixed passenger and freight trains are operated to and from Polk City in the same manner. It is also alleged that the line as operated is more advantageous to the plaintiff and other property owners in Polk City than as the road was originally constructed; and the road as now operated affords reasonable and sufficient facilities for the trade and commerce of Polk City, and for all persons going to or from there; that, owing to the heavy grades, a first-class road could not be operated by Polk City. The defendants also pleaded an estoppel and the statute of limitations. There may be other allegations of the petition and answer to which we have not deemed it necessary to refer.

The court, among others, gave the following instructions to the jury:—

“3. I instruct you that, under the uncontroverted facts, the Chicago and Northwestern Railway Company is bound to maintain and operate a railway substantially upon the line as originally located and constructed, so as to afford reasonable railway facilities to the public. Said company has, however, the right to make reasonable changes and variations from the line as originally constructed and operated, if, in so doing, the public interests would be promoted, though incidentally the plaintiff or others would sustain damage by the change.”

“5. You will first decide whether the public interest is concerned in having the main line of said road operated by way of Polk City. You observe it is as to the public interest you are to inquire, and not merely as to the interest of Polk City and vicinity. It is as to the interest of the general public, including those who do business at and with Polk City, in traffic and travel over said road, that you are to consider. In deciding this issue, you will take into consideration the wants of the general public in the way of railroad facilities over that road, the facilities afforded by the road operated as it is, and as it would be if operated as a main line by way of Polk City, and all facts proven, fairly tending to show whether the public interest is concerned in this matter.”

“11. In order to enable the plaintiff to maintain his suit, it is not enough that he may have sustained damage by depre-

ciation of his property at Polk City, or otherwise, or that other citizens of Polk City have sustained such damage by the change in location and operation of the road. It must further appear that the public interest requires the road to be operated upon the original line; or, if there is no public interest which has received detriment, there has been no breach of a public trust or duty on the part of the defendants, or either of them.

"12. The public interest which must have received detriment by the change in the location and operation of the railroad must be not merely the interest of the general public of Polk City or its vicinity, but of the general public, or the people of this state, who use defendants' line of railway for traffic or travel; and if this general interest will not be promoted by the relocation and operation of the road upon the original line, then the plaintiff cannot maintain this suit, even though the jury should find that it would be for the interests of the plaintiff and other citizens of Polk City to have the railway maintained and operated over the original line."

1. The defendants filed a motion for a new trial upon several grounds, among which are, that the verdict is not in accord with the foregoing instructions, and that, under the evidence and said instructions, the verdict should have been for the defendants. This motion was sustained, but upon what ground we are not advised. If, however, any single ground of the motion is well taken, the ruling of the court must be sustained. The instructions, whether right or wrong, constitute the law of the case, and it was the duty of the jury to follow them. The instructions lay down the rule that unless the interests of the general public have been injuriously affected by what the defendants did, then the plaintiff is not entitled to recover. There is no evidence tending to show that the interests of the public have been prejudicially affected. Fairly considered, we think the evidence shows that the general public have been benefited by the change made in the location of the road. Therefore the verdict is against the instructions of the court, and the court rightly held that the defendants were entitled to a new trial.

2. Counsel for the appellant insist that the foregoing instructions are erroneous, and it is insisted that we determine this question now, so that both parties may be advised as to their rights when another trial is had. It is provided by statute that the "*order of mandamus* is granted on the petition of

any private party aggrieved": Code, sec. 3377; and conceding that *mandamus* is the proper remedy, the inquiry is, whether a private person may pursue such remedy without regard to the public interest, or in disregard thereto.

It is said that the weight of authority sustains the proposition that "where the question is one of public right, and the object of a *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result. it being sufficient to show that he is a citizen, and as such is interested in the execution of the laws": High on Extraordinary Legal Remedies, secs. 431, 432. This being so, it seems to us that it necessarily follows that, unless the public interests have been injuriously affected, a private individual cannot insist that a public right or duty be enforced. If he can, it must logically follow that he may do so when the public interests have been benefited, and thus compel the performance of a duty which the general public have waived or acquiesced in and expressly recognized what has been done. For instance, if the plaintiff is successful in this action, the defendant will be compelled to construct and operate its main line of road by Polk City. Now, it may, for the purpose of argument, be assumed that this would injuriously affect the interest of the general public, and that the representatives of the general public do not desire that the main line of the road should be so operated. In such case, why should the plaintiff have the power to enforce such duty? On the sole ground, we presume, that his private interests have been injuriously affected, when the public interests possibly have been benefited. Whatever right the plaintiff has must be grounded on the fact that performance of a public duty is cast on the defendant. There is not, and never was, a duty or obligation based on any contract existing between the plaintiff and either of the defendants. But the theory of the plaintiff is, that, when one of the defendants accepted the tax on the condition upon which it was voted, it became the duty of such defendant and its successors to construct and operate the road in accordance with the conditions upon which the tax was voted, and that he may enforce such public duty in this action if he shows that he has suffered private damage because of the defendants' failure. This will be conceded, if the public interests have also been injuriously affected, and not otherwise. If this is not so, then,

under the pretense of vindicating and enforcing a public right, a private individual might inflict great and possibly irreparable injury on the general public. This, it seems to us, he should not be permitted to do in a case like this. The case under consideration is materially different from one where an officer is entitled to compensation which another officer refuses to pay. In such case the former may clearly have *mandamus* to enforce the payment of such compensation. Other cases of a similar character may no doubt be suggested. In the case at bar there is no private right, but, it will be conceded, a public right or duty which the plaintiff seeks to enforce. This he cannot do unless the public interests have been injuriously affected, and therefore the instructions above set out are correct. The instructions, of course, were given on the theory that there was evidence tending to show that the accommodations afforded by the defendant by running trains to and from Polk City were fairly and substantially sufficient for all the purposes of trade, and the accommodation of passengers to and from Polk City. The plaintiff and other citizens thereof have not been deprived of railroad facilities.

The judgment of the district court must be affirmed.

NEW TRIAL ON GROUND OF DISREGARDING INSTRUCTIONS OF COURT: *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 129, note; *Pearson v. Burditt*, 26 Tex. 157; 80 Am. Dec. 649; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235. New trial will be granted where conflicting instructions are given by the court to the jury: *Pomroy v. Parmlee*, 9 Iowa, 140; 74 Am. Dec. 328.

MANDAMUS IS NOT REGARDED AS APPROPRIATE REMEDY FOR ENFORCEMENT OF CONTRACT RIGHTS OF PRIVATE AND PERSONAL NATURE, and obligations which rest wholly upon contract, involving no questions of public trust or official duty: *Tobey v. Hakes*, 54 Conn. 274; 1 Am. St. Rep. 114, and cases collected in note 116.

GENERAL RULE IS, MANDAMUS WILL NOT ISSUE where applicant has other adequate remedy: *People v. Board of Police*, 107 N. Y. 235; *Tobey v. Hakes* *supra*.

MANDAMUS BY PRIVATE INDIVIDUAL TO COMPEL PERFORMANCE OF PUBLIC DUTY. — In *State v. Weld*, decided November, 1888, in Minnesota, *mandamus* was brought to compel the respondents as register of deeds and auditor to comply with the statute, and keep their offices at the county seat, said offices being kept by them six miles distant therefrom, and it was decided that inasmuch as "the relators were 'freeholders, tax-payers, and legal voters of the county, this rendered them sufficiently interested to entitle them to move as relators,'" and the court says: "Who is 'beneficially interested' so as to entitle them to file an information depends upon the object to be obtained. When *mandamus* is resorted to to enforce a private right, the person interested in having the right enforced must be the relator. But the great weight of American authority is, that where the object is, as in these cases, to enforce a public duty not due the government, as such, any private person

may move to enforce it. . . . It was enough that the relators in this case were citizens of the county, and as such interested in having the law enforced by compelling these public offices to be kept at the county seat." That a private person may move without the intervention of the attorney-general for a writ of *mandamus* to enforce a public duty not due the government, as such, is also held in *Attorney-General v. Boston*, 123 Mass. 460, 469, citing *Union Pacific R. R. v. Hall*, 91 U. S. 343, 355. Substantially the same conclusion as that reached in *State v. Weld*, *supra*, and *Attorney-General v. Boston*, *supra*, is arrived at in *Village of Glencoe v. People*, 78 Ill. 382; *State of Nevada v. Gracey*, 11 Nev. 223; *State v. Shropshire*, 4 Neb. 411; *Templeton v. Police Jury of Carroll*, 11 La. Ann. 141; *Moses v. Kearney*, 31 Ark. 261, 264, citing *Moses on Mandamus*, 137; *Hamilton v. State*, 3 Ind. 458; *People v. Collins*, 19 Wend. 56; *County of Pike v. State*, 11 Ill. 202; *State v. County Judge*, 7 Clarke, 186; *People v. Tracy*, 1 How. Pr. 186; *People v. Supervisors*, 18 Id. 461. The case of *Moses v. Kearney*, *supra*, however, while holding this to be the law, decides that under the statute of that state proceedings in *mandamus* could not be sustained unless the petitioners have some special interest not common to the rest of the community. But examine *Heffner v. Commonwealth*, 28 Pa. St. 108; *Ready v. Eagle*, 23 Kan. 254; *Sanger v. County Commissioners of Kennebec*, 25 Me. 291; *People v. Inspectors of State Prison*, 4 Mich. 187. See also High on Extraordinary Legal Remedies, sec. 431, where the distinction is made by the author between cases where "*mandamus* is invoked merely for the purpose of enforcing or protecting a private right unconnected with the public interest, and those cases where the purpose of the application is the enforcement of a purely public right where the people at large are the real party in interest"; and it is added that "the decided weight of authority supports the proposition that where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest, and his rights must clearly appear. On the other hand, when the question is one of public right, and the object of the *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator . . . need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws." See *Pumphrey v. Mayor etc. of Baltimore*, 47 Md. 145; 28 Am. Rep. 446, and note 448; note to *Dane v. Derby*, 89 Am. Dec. 740. So the court in *Mitchell v. Boardman*, 79 Me. 469, refused to grant a writ of *mandamus* brought by a private individual to compel a police-court judge to issue a warrant for search and seizure upon his complaint; the ground of such refusal being that no private right, as distinct from the public, was involved, it being merely "the refusal of a public officer to act in a public matter." And the county commissioners, instead of the attorney-general, are declared in Florida to be the proper parties to apply for *mandamus*, where, under the statute, they had the power to employ, at hard labor upon public works, convicts imprisoned in the county jails, and the purpose of the *mandamus* was to compel the sheriff to deliver over, for the purpose of utilizing their labor, as provided by statute, certain convicts in the county jail in their county, the basis of the decision being that that county was more interested than any other county in having such convicts employed upon public works therein, and also that the duty of having the statute enforced devolved upon the county commissioners of the county in whose jail the convicts were imprisoned: *Holland v. State ex rel. Duval County*, 23 Fla. 123. But *mandamus* will not be granted upon the application of a private citizen

to compel the officers of a borough to call a borough-meeting, although the statute provides that twenty freemen might, "at any time, by petition, oblige the warden and burgesses to call a special meeting of the borough," and the borough officers have, upon such petition, refused to call such meeting. The reason for refusing to grant the writ being that the relator had no rights other than those possessed by him in common with every other freeman of the borough, that "the duty of the officers is owing, not to the plaintiff alone, but to all, the damage which he has sustained by the non-performance of that duty is shared by all, and the remedy is open equally to all. That remedy is not in a suit in his own name, but a suit instituted by and in the name of the state": *Peck v. Booth*, 42 Conn. 271, 275. An interesting case of value on this point is that of *Sansom v. Mercer*, 68 Tex. 488, where it was held that a writ of *mandamus* to compel the mayor to order an election to restrict the limits of a certain city might properly issue, although it was signed by qualified voters of that territory. The court, in deciding the case, says: "It is also urged that appellees, in their petition, showed no such interest in the ordering of the election as would authorize them to sue out a writ of *mandamus*, and in support of the proposition we are cited to the cases of *Turner v. Commissioners*, 10 Kan. 16, and *Bobbett v. State*, 10 Id. 11. But the former case simply decided that a mere voter and freeholder in a township has not a sufficient interest to sustain a *mandamus* to compel the county board to order an election in such township upon the question of issuing bonds. So the latter holds that the citizens of a county, merely as such, have no such interest in the question as will authorize them to bring a suit to compel the commissioners to order an election for the removal of a county seat. This court has once announced virtually the same doctrine: *Harrell v. Lynch*, 65 Tex. 146. But here we have a different question. The appellees are alleged to be qualified voters in the territory sought to be excluded; consequently they are males over twenty-one years old, and as such are subject to pay a poll tax to the municipality: R. S., art. 428. This gives them a direct personal interest in having the territory in which they live excluded from the corporate limits. They are doubtless subject to other burdens and restrictions from which they would be relieved by a removal of the city limits": *Sansom v. Mercer*, 68 Tex. 493.

JEAN v. HENNESSY.

[74 IOWA, 348.]

JUDGMENT BY DEFAULT MAY BE SET ASIDE UPON SUFFICIENT SHOWING; AND AN ASSURANCE TO AN ATTORNEY by a judge as to the course which will be pursued in the cause, even though unauthorized, may be a good ground, if it has in good faith been acted upon by the party. So a mistake, even though it relate to a matter concerning which the party is charged by law with notice, may afford a sufficient cause.

VACATING JUDGMENT—SUFFICIENCY OF AFFIDAVIT OF MERITS.—Such affidavit is sufficient where defendant's attorney states in effect therein that all matters alleged in the petition as grounds for the action were involved and litigated in a former action between the same parties; it is not sufficient, however, in such case for a party to rely upon a mere general statement that he has a good defense to the action, but the necessary facts must be averred.

Id. — In such case an attorney who has full knowledge of the facts, and was engaged in the former litigation, is competent to make affidavit.

PRACTICE. — UPON APPEAL FROM ORDER SETTING ASIDE DEFAULT, supreme court will not consider complaint that the court below in opening default permitted a demurrer to be filed to the petition, when such matter did not pertain to the order, and the remedy was by moving to strike the demurrer from the files and the court below has not determined the right to demur.

A. T. Wheeler, for the appellant.

Ellis and McCoy, and W. J. Knight, for the appellee.

REED, J. 1. The judgment was entered on the 29th of January, 1887, and the motion to set aside the default was filed during the same term of court. The questions arising in the case are as to the sufficiency of the showing made in excuse of the default and of the affidavit of merits. Defendant resides in the city of Dubuque, and the attorney who had charge of the cause for him in the court below also resides in that city. The action was commenced before the preceding term of the district court, and defendant's attorney appeared in the cause at that term, but filed no pleading in the cause. He applied to the court for time to plead, and time was given him, but no time was fixed within which he was required to plead. The judge stated to the attorney, however, that no further action would be taken in the cause without notice to him. The cause was then continued generally, and the attorney left the court. Under the order then in force fixing the times of holding the district and circuit courts in that district, the next term of the district court would commence about the 1st of March, and a term of the circuit court would commence early in January. On the first of January, however, the statute abolishing the circuit court (Acts 21st Gen. Assem., c. 134) took effect; and under section 6 of the act, a term of the district court would, unless some other provision was made by order of the judges, commence at the time fixed in the order for holding the circuit court. The showing made in excuse of the default is to the effect that the attorney overlooked the fact that a term of the district court would commence in January until near the end of the month, and that he relied on the assurance given him by the judge at the former term that nothing further would be done in the case without notice to him, and did not go to Clinton County until informed that a default had been taken in the case. We think the showing is sufficient. It is true that the parties were

bound to take notice of the fact that, under the statute as it existed after the 1st of January, a term of the court would occur in that month. It is also true, perhaps, that the judge could not, by a mere parol assurance as to the course which would be pursued in the cause, bind any of the parties or conclude their rights. But an application to set aside a default is addressed to the sound discretion of the court. A sufficient excuse for making the default must be shown; but a mistake, even though it relate to a matter concerning which the party is charged by law with notice, may afford sufficient ground of excuse. So, also, may an assurance by the judge as to the course which will be pursued in the cause, even though unauthorized, if it has in good faith been acted on by the party. It is not necessarily an act of negligence to rely on such assurance. The showing brings the case within the rule of *Ordway v. Suchard*, 31 Iowa, 481.

The affidavit of merits was made by the attorney for defendant, and was to the effect that all the matters alleged in the petition as grounds for the action were involved and litigated in a former action between the same parties. This was sufficient. It is only necessary in such case to show that the party has a defense to the claim made against him. This must be done, it is true, by giving a statement of the facts constituting his defense. The party cannot rely upon a mere general statement that he has a good defense to the action: *Jaeger v. Evans*, 46 Iowa, 188; *King v. Stewart*, 48 Id. 334. But defendant did not rely upon such general statement, but averred the facts constituting his defense.

It is insisted, however, that the affidavit should have been made by defendant, and that the attorney was incompetent to make it. It often occurs, however, that the attorney has full knowledge of the facts constituting the defense in the case. We know of no reason why he might not, in such case, make the affidavit of merits. The statute contains no provision forbidding it, and there is no reason growing out of the nature of the case which precludes him from making it. The attorney in the present case was engaged in the former litigation between the parties, and was doubtless more familiar with the facts than was defendant himself.

Complaint is also made that the court, after setting aside the default, permitted the defendant to file a demurrer to the petition. The statute (section 2871) provides that one of the conditions upon which a default may be set aside is, that "of

pleading issuably and forthwith." In the present case, however, when the order was made, it was agreed by the parties that defendant should have until the first day of the next term to "plead," and the agreement was embodied in the record, and the demurrer was filed at the time so designated. We are of opinion that this question cannot be considered upon this appeal. The appeal is from the order setting aside the default; but the matter complained of occurred long after the order was made, and relates to a matter which does not pertain to the order. If, as plaintiff contends, the only pleading defendant was entitled to file was an answer, his remedy was by moving to strike the demurrer from the files; and until the question of the right of defendant to demur has been passed upon by the lower court, we cannot determine it. The order of the district court will be affirmed.

DEFAULT INCURRED BY FOLLOWING ADVICE OF COUNSEL IN GOOD FAITH SHOULD BE RELIEVED AGAINST where the judgment is for a large sum, and a meritorious defense exists: *Whereatt v. Ellis*, 70 Wis. 207; 5 Am. St. Rep. 164.

NEGLECT OF COUNSEL AS GROUND OF RELIEF FROM DEFAULT: See *Spaulding v. Thompson*, 12 Ind. 477; 74 Am. Dec. 222, note.

DEFAULT, PROCEEDINGS TO VACATE: *Ratliff v. Baldwin*, 29 Ind. 16; 92 Am. Dec. 332, note.

JUDGMENT BY DEFAULT INCURRED BY DEFENDANT'S RELYING upon statements made by the trial judge will be set aside, and leave given to file answer and try cause on its merits: *Sanders v. Hall*, 37 Kan. 271.

MEEKER v. MEEKER.

[74 IOWA, 352.]

WILL — NON-EXPERT EVIDENCE OF TESTATOR'S MENTAL CAPACITY. — Upon a question as to the testamentary capacity of testator, neighbors of the decedent who were well acquainted with him are competent to give opinions as to his sanity, and may testify as to his appearance, as to whether his mind was weakened, the general state of his health when last seen, and his ability to hold an extended conversation. There must of necessity be expressions of opinions by witnesses in regard to appearance, conversation, and acts of one whose mental capacity is brought in question.

ID. — Upon question of testator's capacity to make a will, witnesses may detail conversations had in his presence regarding his condition of mind, and that he remained silent.

TESTAMENTARY CAPACITY. — ALTHOUGH HYPOTHETICAL QUESTIONS PUT TO EXPERTS should as a general rule be based upon facts which the evidence tends to prove, yet it is not required that the facts should be conceded, nor is technical accuracy required in framing the questions.

DEFINITION OF MENTAL CAPACITY REQUIRED IN MAKING A WILL. — A person of sound mind in such case is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and to do business generally, nor to engage in complex and intricate business matters.

MENTAL CAPACITY OF TESTATOR — INSTRUCTIONS AS TO WEIGHT OF EXPERT EVIDENCE. — Where two physicians testified for proponents and two for contestants in a will case, and their evidence was based upon personal examination by them of decedent made to determine his mental capacity, an instruction to the jury that testimony of physicians of large experience is usually in such cases entitled to more weight than that of unprofessional witnesses, but that in the case on trial it was a question for the jury whether the testimony of the medical men was entitled to more weight than that of other witnesses, is correct.

TAXATION OF COSTS AGAINST EXECUTOR IN WILL CONTEST. — It is the duty of executor to probate will of his testator, and he should not be held personally liable for costs in the absence of showing of bad faith or the like, especially where the verdict in such will contest was general, and an examination of the evidence clearly shows that it was founded upon a want of testamentary capacity in the decedent.

Stivers and Strong, and D. D. Applegate, for the appellants.

Struble and Stiger, for the appellees.

ROTHROCK, J. 1. The writing claimed to be a will was made and executed in August, 1886, and William Meeker died in October of the same year, aged seventy-seven years. He removed from Warren County, Ohio, to this state in the year 1856, and for many years prior to and up to the time of his death he owned and lived upon a farm in Tama County. By the will in question he disinherited the contestants. The evidence introduced upon the trial was directed mainly to his mental capacity at the time the will was made. There is no conflict in the evidence that for some years before the will was made, the old man was in very feeble health, and that he had to a certain extent lost much of his former capacity for the transaction of business. At one time, by an arrangement among his children, a neighbor was selected to hold certain of his bank certificates of deposit, and transact business to some extent for him. In addition to his feeble condition, he had lost the sight of one eye, and the sight of the other was seriously affected. His condition was such that legal proceedings were instituted involving his mental capacity.

This led to an examination of him by physicians and others for the purpose of ascertaining his condition. These parties were called, and examined as witnesses, and as is usual in such cases, there was quite a conflict in their testimony. The first complaint urged in argument by appellant's counsel is, that the court erred in rulings upon the admission and exclusion of evidence. Counsel for contestants propounded the following questions to witnesses for contestants: "How was his appearance? What makes you think he did not know you on this day? Do you mean that his mind was simply weakened, or that it was impaired in some of its faculties? Did he get worse or better up to the last time you saw him? You may state whether he could or could not hold a conversation, —an extended conversation." These questions were objected to by counsel for proponents, and the objections were overruled. The witnesses to whom the questions were propounded were not physicians. They were neighbors of the decedent who were well acquainted with him, and were competent to give opinions as to his sanity. It is claimed that these questions called for opinions upon questions of which the jury were equally qualified to judge, if possessed of the same facts as the witnesses. We think the rulings of the court were correct. It seems to us quite plain that if the witness could not reproduce the appearance of the decedent, he could not detail facts so as to put the jury in his place, so to speak. There must of necessity be expressions of opinions by witnesses in regard to the appearance, conversation, and acts of one whose mental capacity is brought in question: *Yahn v. City of Ottumwa*, 60 Iowa, 429.

2. Other witnesses were allowed to detail conversations had in the presence of the decedent regarding the condition of his mind. They were such as would naturally call for some response from him, and he remained silent. It is insisted that these conversations were incompetent evidence because the witnesses did not state that decedent heard what was said. There is no showing made that his hearing was defective, and we think it was a question for the jury whether he heard the conversations.

3. Both sides introduced physicians who had examined the decedent with the view of making up an opinion as to the condition of his mind. Those who were introduced by proponents expressed the opinion that he was of sound mind. To one of them, counsel for contestants propounded the following

question on cross-examination: "Supposing Mr. Meeker had been a man of fair, ordinary ability all his life,—a man of fair, ordinary intelligence and mental capacity,—and providing, for a year or so prior to a given date, his mental faculties were more or less impaired, such as the faculty of memory impaired, and forgetful,—couldn't remember things, and he couldn't remember some of his nearest neighbors who have resided near to him for twelve or thirteen years; providing his children, or some of them, should have a meeting in his presence, and state his mind was in such a condition that he was not any longer fit and capable of transacting his own business, and they should select an agent or guardian to take charge of his business and papers, such as bank checks, drafts, certificates of deposit, and notes, and should turn them over to the agent in his presence, and the old gentleman didn't make any objection to that, or to the assertion that his mind was in that condition that he was no longer fit to do business, that his physical condition was also very weak,—what would you say, then, your opinion is as to whether Mr. Meeker was of sound or unsound mind?" To another physician, a question was propounded in these words: "Suppose the testator was seventy-seven years of age, providing he had been afflicted with the complaint, say for a year or so more previous to making of his will; providing his condition was such that at times he would not know some of his nearest neighbors, and his old friends and acquaintances whom he had known for thirty years; providing he had a loss of memory; providing, when people would attempt to hold conversation with him, he would stop it, saying, 'I can't remember'; providing he would not know any of his grandchildren who were with him in the evening, and staid all night; providing he was unable to hold a connected conversation,—he would forget a few minutes afterwards what he had said a few minutes previous; providing one of his near neighbors, and a man who had been appointed and selected as his agent, would say to him, in a conversation referring to an old acquaintance at a distance, he mentioned the fact he died, and had become of unsound mind, and couldn't remember his children, and the testator should say, 'William,' referring to the neighbor, 'that is just my condition; I am no longer able to remember or know my own children one from the other'; and this physical condition should continue which I have mentioned,—and then what would you say would be your opinion of the testa-

tor's mind as to whether it was sound or unsound?" These questions were objected to, upon the ground that they were incompetent, as being without proper foundation in the evidence. The objections were overruled. Counsel for appellants claim that these rulings were erroneous, and they cite to us *State v. Cross*, 68 Iowa, 180. In that case, a witness was sought to be impeached by expert evidence, and it was held that the hypothetical questions put to the experts should be based upon the language of the witnesses. In the case at bar, the question at issue was the sanity of the decedent. It is a general rule that hypothetical questions put to experts should be based upon facts which the evidence tends to prove. In this case, a careful examination of the evidence leads us to the conclusion that the questions under consideration were not objectionable. It is not required that the questions should be based upon conceded facts, nor is technical accuracy required in framing the questions. If they are entirely without the support of evidence, they should be excluded. Ordinarily, opposing counsel will not be slow, in a re-examination of the witness, to correct the hypothesis upon which the question is based, if it be incorrect.

4. Among other instructions, the court gave to the jury the following: "A person of sound mind, within the meaning of the law in this case, is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters." It is claimed that this instruction fixes testamentary capacity as greater than is legally required. There are varying forms of expression to be found in the books in defining testamentary capacity. In *Bates v. Bates*, 27 Iowa, 110, 1 Am. Rep. 260, an instruction in substance and meaning very nearly the same as that under consideration was approved by the court; and in *Will of Convey*, 52 Iowa, 197, an instruction substantially like this one was sustained. We do not think the objection to the instruction ought to prevail.

5. Another instruction directed the jury that "the testi-

mony of medical men of large experience, as a general rule, in this class of cases, is entitled to more weight than that of unprofessional men. Still, it is a question for the jury to determine, whether the testimony of medical men who testified in this case is entitled to more weight than that of other witnesses." Four physicians were examined as witnesses,—two in behalf of the proponents, and two in behalf of the contestants. They were not mere experts, whose testimony was founded upon facts testified to by other witnesses. They each made a personal examination of the decedent for the very purpose of ascertaining his mental capacity. In view of these facts, we think the instruction complained of is correct.

6. It is claimed that another instruction required the jury to find that, in order to sustain the will, they must find that the evidence disproved the averment of undue influence. We do not regard it as necessary to set out the instruction complained of. It appears to us that it could not have been understood by the jury as imposing upon the proponents the burden of proving that the will was not procured by undue influence.

7. It is urged that the verdict is not sustained by the evidence. The evidence is conflicting, and we entertain no doubt that it is abundantly sufficient to sustain the verdict, especially upon the ground that the decedent was wanting in testamentary capacity.

8. The contestants filed a motion asking that all the costs of the trial, excepting the fees of the witnesses to the will, be taxed to the proponents. The motion was overruled, from which ruling the contestants appeal. We think, considering the facts of the case, that the ruling was correct. It is true, as contestants claim, that the statute (Code, sec. 2933) provides that "costs shall be recovered by the successful party against the losing party." But it is the duty of an executor to probate the will of his testator, and he should not be held personally liable for costs in the absence of a showing of bad faith or the like. Two of the parties named as proponents were the executors named in the will. It is possible, if the verdict had been based on undue influence exercised by them, they should be required to pay the costs. But the verdict was general; and an examination of the evidence leaves little doubt that it was founded upon a want of testamentary capacity in the decedent. It may be likened to a claim found among other assets of an estate. It is the duty of the execu-

tor to proceed to collect it by legal means if necessary. If he should be defeated in an action, he cannot be held personally liable for costs, unless he, in bad faith, makes them unnecessarily: *Phillips v. Phillips*, 81 Ky. 328.

Affirmed.

MENTAL CAPACITY REQUIRED IN MAKING WILL: See *Chandler v. Barrett*, 21 La. Ann. 58; 99 Am. Dec. 701; *St. Leger's Appeal*, 34 Conn. 434; 91 Am. Dec. 735; *Kirkwood v. Gordon*, 7 Rich. 474; 62 Am. Dec. 418; *Brown v. Ward*, 53 Md. 376; 36 Am. Rep. 422; *Will of Smith*, 52 Wis. 543; 38 Am. Rep. 756; *Pidcock v. Potter*, 68 Pa. St. 342; 8 Am. Rep. 181, 184, note; *Robinson v. Adams*, 62 Me. 369; 16 Am. Rep. 473; *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 689, 690, note; *McCulloch v. Campbell*, 49 Ark. 367.

TESTAMENTARY CAPACITY — OPINIONS OF NON-PROFESSIONAL WITNESSES: *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681, and cases collected in note 689; *Hardy v. Merrill*, 56 N. H. 227; 22 Am. Rep. 441; *Blake v. Rourke*, 74 Iowa, 519; *In re Will of Norman*, 72 Id. 84.

COSTS OF BOTH PARTIES MAY BE CHARGED UPON ESTATE where there was probable cause for contesting the validity of a will, as shown by the conduct of the testator: *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681.

TESTIMONY OF PHYSICIANS, GIVEN AFTER CAREFUL EXAMINATION of testator's mental condition, may properly be allowed more weight and consideration than that of non-professional witnesses: *Blake v. Rourke*, 74 Iowa, 519.

HYPOTHETICAL QUESTIONS TO EXPERT WITNESS, for his opinion, ought to include only such facts as are admitted or in evidence; but it is not a question as to weight of evidence, but only whether there has been any evidence tending to show the assumed fact: *In re Will of Norman*, 72 Iowa, 84.

BROWN v. STATE INSURANCE COMPANY.

[74 IOWA, 428.]

THE ADMISSION IN EVIDENCE OF AN UNAUTHENTICATED LETTER is not error sufficient to warrant a reversal therefor, when such letter only goes in proof of a fact already sufficiently proven by testimony admitted without objection.

AGENT OF FIRE INSURANCE COMPANY MAY WAIVE FORFEITURE where claim for loss has been placed in his hands for adjustment. It will be presumed that he was authorized to do whatever was required to be done in adjusting the loss.

WAIVER OF FORFEITURE FOR BREACH OF CONDITION OF INSURANCE. — Where company has knowledge that insured has broken condition in policy requiring him to keep his books and invoices so as to protect them from fire, and that the books are burned in consequence, it waives the forfeiture if it requires the insured to furnish it with copies of such books and invoices for their examination, and induces him to incur labor and expense in procuring them.

Cummins and Wright, for the appellant.

J. K. Macomber and George A. Underwood, for the appellee.

REED, J. The property insured was a stock of merchandise. The policy was issued on a written application, which was indorsed on the policy when it was issued, and which contained the following agreement: "Applicant further agrees to keep a set of books showing all purchases and sales for cash and credit separately, and to keep a copy of the last inventory; and that said books and inventory shall be kept in a fire-proof safe, or in such a manner as to avoid danger of their being destroyed with the property hereby insured." Defendant pleaded a breach of this undertaking, and plaintiff, in reply, pleaded a waiver of such breach. The evidence showed, without any conflict, that plaintiff did not keep his books and inventory in a fire-proof safe, but kept them in a wooden desk in his store, and that they were destroyed by the fire that destroyed the insured property. The matter relied on by plaintiff as constituting a waiver of this breach of his agreement is, that defendant, with full knowledge of the manner in which the books and inventories had been kept, and that they had been destroyed by the fire, required him to procure and produce copies of all invoices and bills of goods purchased by him for a number of years before the fire; and that, in obedience to such demand, he did, at great expense and trouble, procure copies of such bills and invoices, and submitted them to defendant. The evidence shows that defendant, when it received notice of the fire, and a proof of the loss furnished by plaintiff, placed the claim in the hands of C. F. Leavitt, one of its adjusters, who went to the scene of the fire, and examined plaintiff with reference to the circumstances of the loss. In his examination, plaintiff disclosed the facts as to the destruction of the books and inventories, and the manner in which they had been kept. After the examination was closed, Leavitt served upon plaintiff a notice in writing, as follows: "You are hereby notified and required to furnish, at your earliest convenience, . . . the State Insurance Company, of Des Moines, your original bills of purchase; or if they are lost or destroyed, you will furnish certified copies thereof procured from the various houses from which you have bought goods. These must cover all your purchases from the time you bought the stock of A. P. Condit to time of fire which destroyed said stock. This demand is

made under the conditions of the policy you hold of said company: See Proceedings in Case of Loss." In compliance with this demand, plaintiff did procure from such of the wholesale houses with which he had dealt as continued in business copies of the invoices of the goods purchased by him from them during the time covered by the demand. In doing that, he spent considerable time, and incurred some expense and inconvenience. He notified defendant that he had procured them, and Leavitt again went to his place and examined them; and it was not until after that was done that defendant refused to pay the loss.

1. The district court, against defendant's objection, admitted in evidence a letter received by plaintiff, and which purports to have been written by Leavitt. The letter is written on defendant's letter-head, and purports to have been written at its agency at Kansas City, Missouri; but there was no evidence of the genuineness of Leavitt's signature to it. It points out a number of particulars in which the proof of the loss and the accompanying papers are alleged to be insufficient, and states that certain things are demanded; but whether it was meant by this that they were demanded by the provisions of the policy, or by the company for the perfecting of the proofs, is not clear. The objection urged against its admission is, that it was not shown to have been written by Leavitt. But in the view we take of the case, it is not necessary to go into that question, for, according to plaintiff's testimony, he incurred the labor and expense of procuring the duplicate invoices in obedience to the demand made upon him by Leavitt at the close of the examination; and if it should be conceded that the demands of the letter were for the perfecting of the proof, they were but a repetition of the former demand, and were consequently immaterial. Defendant could not, therefore, have been prejudiced by the admission of the letter; and conceding that there was error in its admission, it affords no ground for disturbing the judgment.

2. There was no direct evidence as to the extent of Leavitt's authority, and it was urged that as the verdict necessarily implies a finding by the jury that he had authority to waive the forfeiture, it is without the support of evidence. Counsel contended that the case on this point is governed by *Hollis v. State Ins. Co.*, 65 Iowa, 454. But there is a clear distinction between the cases. In that case it was proven simply that an alleged agent was an adjuster of the insurance company, and

that he called on the plaintiff with reference to the loss. It was not shown that the particular claim in question had been placed in his hands for adjustment, and we held, on that state of the evidence, that it could not be presumed that he had authority to do the particular thing which it was held would, if it were done by the authority of the company, amount to a waiver of the forfeiture. But in the present case it was shown by the secretary of the company that the claim was placed in Leavitt's hands for adjustment. He was the agent of the company, then, for the transaction of that particular business; and it will be presumed that he was authorized to do whatever was required to be done in adjusting the loss; and the verdict, so far as this question is concerned, is supported by that presumption.

3. The remaining question is, whether the act of the agent in demanding that plaintiff procure the copies of the bills and invoices of his purchases, and submit them to the company for examination, amounted to a waiver of the forfeiture. In the Hollis case we held that if the insurer, with knowledge of the facts constituting the forfeiture, continues to treat the contract as of binding force, and induces the insured to act upon that assumption, and incur expense and trouble while acting in that belief, he cannot afterwards go back and take advantage of the forfeiture. The facts of this case bring it within that holding. When defendant was informed of the destruction of the books and inventories, and the manner in which they had been kept, it had the right—assuming that those facts constituted a forfeit, as the court below held they did—at once to stand upon the forfeiture and declare the contract at an end. But it had the right also to waive the forfeiture and treat the contract as still in force, leaving the question whether it would pay the loss to depend upon subsequent investigation as to other facts. By its demand for the production of the copies of the invoices and bills it made this latter election, for it thereby required plaintiff to produce for its inspection the evidence as to other facts upon which the question of its liability, independent of the forfeiture, depended. Having required plaintiff to incur the labor and expense of procuring the bills and invoices, and having obtained whatever advantage accrued from their production, it would be manifestly unjust to permit it now to go back and take advantage of the forfeiture. The facts of the case do not bring it within the holding of *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335. In that

case the oral information as to the facts constituting the forfeiture was not full, and it was held that the insurer did not waive it by requiring written proof as to those facts, that being the character of evidence required by the policy. But in the present case the oral information as to the facts was full, and the additional evidence required relates to other matters. The judgment of the district court will be affirmed.

JUDGMENT WILL NOT BE REVERSED BY REASON OF IMPROPER ADMISSION OF TESTIMONY, if the facts sought to be proven by such testimony had been clearly established by other competent evidence: *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487; 84 Am. Dec. 758; *Barnett v. Vincent*, 69 Tex. 658; 5 Am. St. Rep. 98.

WAIVER OF FORFEITURE OF POLICY OF INSURANCE BY AGENT OF INSURANCE COMPANY: *Oshkosh Gas Light Co. v. Germania F. Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233, and cases collected in note 236; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686; *Kruger v. Western Fire etc. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and cases collected in note 45; *Mattox v. D. M. Ins. Co.*, 74 Iowa, 233; *Dunbar v. Phoenix Ins. Co. of Brooklyn*, 72 Wis. 492; *Home Ins. Co. v. Gilman*, 112 Ind. 7; *N. B. & M. Ins. Co. v. Steiger*, 124 Ill. 81.

STATE v. TROUT.

[74 IOWA, 545.]

MURDER — BURDEN OF PROOF OF INSANITY. — It is proper to charge the jury that “when the state shows, beyond a reasonable doubt, in the first instance, that the defendant is guilty, then defendant comes to his plea of insanity; and when he comes to rely upon such plea, then, under the law, he is required, in order to excuse his act on account of the alleged insanity, to show, by a preponderance of the evidence, — that is, by the greater weight of credible evidence in the case, — that he was insane”; and an instruction may properly be refused which is, in effect, that if the jury believed it probable from the evidence that accused was insane, this would overcome the presumption of insanity, and entitle him to an acquittal.

SUFFICIENCY OF VERDICT — MURDER. — Where court instructed the jury as to the necessary elements of murder in the first degree, and that it was punishable with death, or with imprisonment for life, at hard labor, in the state penitentiary, and the verdict of guilty was returned, but in designating the punishment as imprisonment in the penitentiary for life the words “at hard labor” were omitted from the verdict, such verdict sufficiently indicates which of two punishments was adjudged.

J. N. Weaver, for the appellant.

A. J. Baker, attorney-general, for the state.

ROBINSON, J. This case was submitted on a voluminous transcript of the record, without an abstract, without any as-

signment of errors or argument of counsel, and with the citation of but a single authority. In this condition of the case, we have examined the record with care, for the purpose of ascertaining what errors, if any, had been committed in the district court, and the grounds upon which defendant relies for a reversal of the judgment.

1. The defendant asked the court to give the jury the following instruction: "While in this case the sanity of the defendant at the time of shooting Hatch, the deceased, is presumed by the law, and the burden of proving insanity rests upon defendant, still, if you believe from the evidence that at the time of such shooting it is probable that defendant was insane, then the presumption of sanity is overcome, and defendant is entitled to an acquittal."

The court refused this instruction, but charged the jury as follows: "When the state shows, beyond reasonable doubt, in the first instance, that the defendant is guilty, then defendant comes to his plea of insanity; and when he comes to rely upon such plea, then, under the law, he is required, in order to excuse his act on account of the alleged insanity, to show, by a preponderance of the evidence,—that is, by the greater weight of credible evidence in the case,—that he was insane."

Other portions of the charge, which we need not set out, further explained the paragraph quoted. The charge given was as favorable to defendant as was the instruction he asked. In legal effect, if a claim is made probable by the evidence, it is for the reason that the preponderance of the evidence is in favor of the claim. The case of *State v. Jones*, 64 Iowa, 356, cited by appellant, is not against this conclusion, but, on the contrary, sustains it. The charge to the jury as to the issue of insanity was in accord with numerous decisions of this court, and was, we think, correct.

2. The court instructed the jury as to the necessary elements of murder in the first degree, and that it was punishable with death, or with imprisonment for life, at hard labor, in the state penitentiary, as determined by the jury. The body of the verdict returned by the jury was in words following: "We, the jury, find the defendant, George Trout, guilty as charged, that is, guilty of murder in the first degree; and we say that he should be punished by imprisonment in the penitentiary for life." It was insisted in the district court that the verdict was fatally defective, and insufficient to authorize a judgment against defendant, for the reason that it

neither authorized the punishment of death, nor imprisonment for life at hard labor in the penitentiary. The objection was founded upon the omission of the words "at hard labor" from the verdict. The law recognizes but two punishments for the offense of which defendant was convicted, and it was the duty of the jury to designate which of these punishments should be inflicted. While the verdict was not so complete as it might have been, yet it indicates beyond question which of the only two punishments authorized in this case it designed to have adjudged.

We discover no error in the record, and the judgment of the district court is therefore affirmed.

INSANITY AS DEFENSE TO CRIMINAL CHARGE, BURDEN OF PROOF RESPECTING: *Gueltig v. State*, 66 Ind. 94; 32 Am. Rep. 99; *State v. McCoy*, 34 Mo. 531; 86 Am. Dec. 121, and cases collected in note 123; *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 176-179, note.

CRIMINAL LAW, WHEN VERDICT MUST SPECIFY DEGREE OF OFFENSE: *Hogan v. State*, 30 Wis. 428; 11 Am. Rep. 575; *Welch v. State*, 50 Ga. 128; 15 Am. Rep. 690; *State v. Johnson*, 75 N. C. 123; 22 Am. Rep. 666; *State v. Rover*, 10 Nev. 388; 21 Am. Rep. 745.

UNCERTAINTY IN SENTENCE ENTITLING PRISONER TO DISCHARGE: *Ex parte Roberts*, 9 Nev. 44; 16 Am. Rep. 1.

GENERAL VERDICT OF GUILTY IS UNDERSTOOD TO FIND HIGHER OFFENSE if there is testimony to support it, and such verdict is not ground for a new trial: *State v. Nelson*, 14 Rich. 169; 94 Am. Dec. 130; and see *State v. Kube*, 20 Wis. 217; 91 Am. Dec. 390.

SULLENS v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILWAY COMPANY.

[74 IOWA, 659.]

SURFACE WATERS. — WHERE RAILROAD COMPANY whose road crosses a stream constructs an embankment over the low lands and valley adjacent thereto in such manner as to turn all the water which flowed from above into the main stream, and builds a culvert over the stream, which is not of sufficient capacity to properly pass the waters of such floods as might reasonably be expected to occur, it is liable in damages to one whose lands are overflowed by reason of the construction of such embankment and insufficient culvert.

SURFACE WATERS, WHAT CONSTITUTE. — Water which overflowed from the main stream some distance above an embankment ceases to be surface water when turned back into the stream by such embankment, and must be regarded, in determining the sufficiency of the culvert, the same as if it had continuously flowed in the channel.

ERROR IN ADMITTING EVIDENCE MAY BE CURED BY INSTRUCTION which withdraws from the jury the consideration of the evidence so admitted.

OVERFLOWING LAND — MEASURE OF DAMAGES. — WHERE RAILROAD COMPANY CONSTRUCTS INSUFFICIENT CULVERT OVER STREAM, and an embankment over low lands and valley adjacent, and thereby obstructs the water, and causes it to overflow land, there is no error in instructing the jury that in estimating damages they may consider the fair market value of the land immediately before and immediately after the overflow in each year, and that the term "land" so used includes the growing crops.

STATUTE OF LIMITATIONS. — IN ACTION AGAINST RAILROAD COMPANY FOR OBSTRUCTING WATER AND OVERFLOWING LAND, the right of action does not necessarily accrue from the time the obstruction was first built, and the plea of the statute of limitations is properly withheld from the jury when it appears that at that time the damages could not have been foreseen and estimated with any degree of accuracy, but depended in part on the seasons.

VERDICT ARRIVED AT BY AVERAGE. — Verdict is not invalid which is obtained by aggregating amounts fixed by each juror as damages, and then by dividing the result by twelve, if such verdict is agreed to afterwards, and there was no agreement beforehand to be bound by the result so obtained.

ACTION for damages for obstructing stream and overflowing land. Appeal by defendant from verdict and judgment for plaintiff.

T. S. Wright, and Winslow and Varnum, for the appellant.

Phillips and Day, and Kerr and McElroy, for the appellee.

ROBINSON, J. The defendant owns and operates a railway which crosses a stream of water in Jasper County, known as Rock Creek. At the point of crossing, the stream is from twenty-five to thirty feet in width, and is bordered on the east by a strip of land lower than the level of the railway track, and on the west by low ground, which extends back from the creek a distance of from a quarter to half a mile. The land and stream form a valley bounded on the west by high lands. Prior to 1875, defendant's railway crossed the creek and lowlands by means of a wooden bridge and trestle-work. During that year a stone culvert was constructed over the stream, and embankments of earth were commenced and completed a year or two later, which extended across the lowlands and culvert to a height of about forty feet above the general level of the lowlands. The culvert was about eighty feet in length, thirty in width, and twenty-two in height, and constituted the only opening in the embankment for the passage of the waters from above it. The plaintiff owns the land which is bounded on the south by the right of way of defendant, on which the embankment in question is built. Rock Creek flows, for a

considerable distance, through the lands of plaintiff before it reaches the culvert in question. In June, 1882, a portion of the culvert fell in consequence of high water. It was never rebuilt; but, to carry its railway across the stream, defendant removed a portion of the earth from the culvert, and constructed over it a wooden bridge. It is contended by plaintiff, that when the culvert was constructed, the bed of the stream under it was raised several feet by means of stone-work; that a portion of it fell in consequence of the fault of plaintiff, precipitating into the stream below, in such manner as to further obstruct the flow of water, large quantities of stone and earth; that defendant had wrongfully permitted said obstacles to remain in the stream; that the embankment caused all the water which fell upon the land adjacent to said stream to flow through said culvert; that its capacity, when constructed, was not sufficient to discharge such water; and that its original capacity has been diminished, and the flow of water hindered, by the obstacles aforesaid; that in consequence of these faults, the lands of plaintiff were overflowed at different times during four years, commencing with 1882, and great damage caused thereby. It is insisted by defendant, that in constructing the embankment and culvert in question, it was only required to make provision for the flowing across its right of way of so much water as could be contained within the banks of the stream, and that it is not responsible for damages which were caused by water which overflowed such banks.

1. The question involved is one upon which there is much conflict of authorities. Many of them seem to sustain the position of appellant. The case of *Abbott v. Kansas City etc. R'y Co.*, 83 Mo. 271, 53 Am. Rep. 581, is in many respects similar to this case, and is relied upon by appellant. That case adheres to the common-law rule, and seems to depend in part upon the fact that by the statutes of Missouri the common law is made the rule of action and decision in that state. In this state there is no requirement of that kind, and we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable. The difficulty which must sometimes arise from attempts to apply the strict rule of the common law to all cases is illustrated by the fact that the supreme court of Missouri was constrained to abandon it in two cases, which were overruled in the one above cited. Each case must of necessity depend largely upon its own facts. Even in those states where the common law prevails, the courts

hold that the land-owner must improve his property in a reasonable manner: *Hosher v. Kansas City etc. R'y Co.*, 60 Mo. 329 *Abbott v. Kansas City etc. R'y Co.*, *supra*; *Pettigrew v. Evansville*, 25 Wis. 229; 3 Am. Rep. 50. "But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. . . . Each proprietor, in such case, is left to protect his own lands against the common enemy of all, . . . so as to occasion no unnecessary inconvenience or damage to plaintiff": *McCormick v. Kansas City etc. R'y Co.*, 57 Mo. 433. See also *Benson v. Chicago etc. R'y Co.*, 78 Id. 504. This court said in *Livingston v. McDonald*, 21 Iowa, 172, 89 Am. Dec. 563, that "the rules of the civil law, . . . so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; . . . and to this extent it is supported by the weight of authority in the common-law courts." It also said: "We recognize the general rule that each may do with his own as he pleases, but we also recognize the qualification that each should so use his own as not to injure his neighbor": Id. 173.

The same principle, as applied to the obstructing of a flow of surface water from the dominant to the servient estate, was recognized in *Drake v. Chicago etc. R'y Co.*, 63 Iowa, 302; 50 Am. Rep. 746. The rule thus far adhered to by this court seems to be just, and we do not think there is sufficient cause to abandon it. The reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways. These have become so necessary to modern civilization that their builders require and are given extraordinary privileges. One of the most important of these is the right to take and hold so much real estate as may be necessary for the location, construction, and convenient use of their railways. The primary object for which railways are built is not to improve the particular tracts of land over which they pass. They are located, in part, with reference to the configuration of the country through which they pass, and the cost of construction. On the other hand, the general land-owner has no voice in the location and construction of a railway. The burden which it may cast upon his land is not such as springs from those improvements which are designed to make the soil productive. Hence it is not a burden to which his estate is natu-

rally servient. If his land be taken by the railway corporation, he is entitled to compensation for such injury as naturally results from the taking; but his land may not be taken, or, if taken, the railway may be so constructed over it as to cause damage which was not a necessary result of the taking. In such cases, if injury result from an improper construction of the railway, or from wrong in its operation, we see no reason why the railway corporation may not be made to respond in damages. In this case, defendant raised its embankment across the valley of Rock Creek in such a manner as to turn all the water which flowed from above into the main stream. It was not practicable for plaintiff to counteract the effect of this by means of banks or ditches. Whatever its primary object may have been, the fact is, that defendant assumed control of the surface waters of the valley, changed their course, and compelled them to flow through an outlet of its own construction. Under these circumstances, we think it was the duty of defendant to construct and maintain its culvert so that its capacity should be sufficient to properly pass the waters of such floods as might reasonably be expected to occur. It would be most unreasonable to limit the obligation of defendant to the providing of such a culvert as would carry off the water which could be contained within the banks of the stream. It is contended by appellant that the case of *Morris v. City of Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, is an authority against the conclusion which we have reached. That case involved the right of a city to establish the grade of its streets, and its duty to provide permanent means for the escape of overflow water. It was, in effect, held that it was not the duty of the city to do more than provide temporary means for the escape of surface water in such cases, and that it was the duty of the lot-owner to bring his lot up to grade, and thereby escape the overflow of which he complained. We do not think that the doctrine of that case is applicable to this. We are of the opinion that the jury were properly instructed in regard to the duties and liabilities of defendant.

2. Appellant complains of the giving of an instruction in the following language: "You are instructed that if Rock Creek was a flowing stream the year round, with well-defined banks, and that defendant constructed over said stream a culvert for the purpose of enabling its railway to pass over said watercourse, and if you further find from the evidence that in times of high water, at a point five hundred feet above

said culvert, more or less, any portion of the water flowing in said creek in times of high water left its banks at such point above said culvert, and then, for a short distance, flowed over the land of plaintiff, but that the same was forced by the embankment of defendant back into the creek again above said culvert, then such waters are not surface waters, but must be regarded by you, in the determination of this case, in determining the sufficiency of said culvert, in the same light as if they had continuously flowed in said creek." The theory of the instruction appears to be, that when the overflowed water is turned back into the stream it ceases to be surface water. This seems to us to be correct: *Jones v. Hannovan*, 55 Mo. 462. But if the instruction will bear a different construction, no prejudice could have resulted from it under the facts of the case.

3. Complaint is made of the ruling of the court in admitting evidence as to the depreciation of the rental value of the premises in controversy on account of the alleged wrong of defendant. It may be conceded that there was error in admitting this evidence. But the court so charged the jury as to the measure of plaintiff's recovery as to necessarily withdraw from their consideration the evidence of which complaint is made. The error should therefore be deemed to be without prejudice: *Ham v. Wisconsin etc. R'y Co.*, 61 Iowa, 719; *Lathrop v. Central Iowa R'y Co.*, 69 Id. 109.

4. It is also insisted that the jury were improperly instructed in regard to the measure of recovery. They were told that the measure of plaintiff's damages for each year was the difference between the fair market value of the land immediately before the injury each year, and its fair market value immediately after such injury; also that the term "land," so used, included the growing crops. This instruction accords with the rule announced in *Drake v. Chicago etc. R'y Co.*, *supra*, and is, we think, correct. The injury was not necessarily permanent because it was to real estate; hence there was no error in permitting the jury to estimate damages for each year of the overflow.

5. This action was commenced in February, 1886. The defendant pleaded the statute of limitations as a defense, and insists that plaintiff's right of action accrued in 1875, when the culvert was completed. The damages which might result from the character of the culvert could not have been foreseen and estimated at that time with any degree of accuracy, but

depended in part upon the seasons. The jury found specially that the first flood after the culvert was built occurred in 1881. We therefore conclude that the plea of the statute was properly withheld from the jury: *Drake v. Chicago etc. R'y Co.*, *supra*; *Van Orsdol v. Burlington etc. R'y Co.*, 56 Iowa, 470.

6. Miconduct on the part of the jury in arriving at their verdict is alleged. Each juror gave the sum he thought should be allowed for each separate year, and the amount of those sums was divided by twelve, and the quotient inserted in the verdict as the amount plaintiff was entitled to recover; but there was no agreement in advance to be bound by the result. After it was ascertained it was agreed to by the jurors: *Hamilton v. Des Moines Valley R'y Co.*, 36 Iowa, 35.

We have examined the record with care, but fail to discover any error prejudicial to defendant.

The judgment of the district court is therefore affirmed.

BACKING WATER BY MEANS OF DAMS, ETC., UPON LANDS OF ANOTHER, is an injury actionable at common law: *Wabash etc. Canal v. Spears*, 16 Ind. 441; 79 Am. Dec. 444; and see *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392, and cases collected in note 400; *Boyd v. Conklin*, 54 Mich. 583; 52 Am. Rep. 831; *McCormick v. Horan*, 81 N. Y. 86; 37 Am. Rep. 479; *Nininger v. Norwood*, 72 Ala. 277; 47 Am. Rep. 412; *Tooth v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732; *Stewart v. Schneider*, 22 Neb. 286.

LIABILITY OF RAILROAD COMPANY for obstructing flow of surface water by embankment: *Little Rock etc. R. R. Co. v. Chapman*, 39 Ark. 463; 43 Am. Rep. 280; *Louisville etc. R. R. Co. v. Hays*, 11 Lea, 382; 47 Am. Rep. 291; compare *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139.

TESTIMONY IMPROPERLY ADMITTED IS HARMLESS ERROR if the same fact was proved by other evidence which was competent and uncontradicted: *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487; 84 Am. Dec. 758; *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98. And judgment will not be reversed for error in admitting testimony that could by no possibility have operated prejudicially to the party defeated: *Mathews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; *De Laittre v. Jones*, 36 Minn. 519.

AVERAGING VERDICT, WHEN GROUND FOR SETTING ASIDE: *Sawyer v. Hannibal etc. R. R. Co.*, 37 Mo. 240; 90 Am. Dec. 382; *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78.

ERROR IN ADMITTING ILLEGAL TESTIMONY IS CURED by subsequently ruling it out and cautioning jury not to take it into account; and such error thus cured will not be a good cause for new trial, unless movant clearly shows himself to have received injury by the action of the court: *Rowland v. Carmichael*, 77 Ga. 350.

CLANCY v. KENWORTHY.

[74 IOWA, 740.]

PETITION SUFFICIENTLY ALLEGES CAUSE OF ACTION AGAINST SURETIES OF CONSTABLE ON HIS OFFICIAL BOND when the bond requires him to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties required of his office by law," and the petition avers the official character of the constable, and an arrest made by him in discharge of the functions of his office, and also alleges such arrest to have been made unlawfully and oppressively, and without probable cause, the malicious and unlawful beating of the person arrested, and his unlawful and malicious incarceration in jail over one night, and the willful neglect to procure any care, attention, or medical treatment for such person during his incarceration, and his need thereof. In such case, it cannot be successfully urged as a defense that the alleged wrongful acts of the constable were not done in the line of his duty, or that his acts were illegal and forbidden by law, and were the result of his private malice.

Nelson and Williams, and W. S. Kenworthy, for the appellants.

Phillips and Greer, for the appellee.

BECK, J. The bond sued on is in the form prescribed by statute (Code, sec. 674), and obligates the principal to render a true account of his office as constable, to pay over all moneys coming to his hands in the discharge of his official duties, etc., and to "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties now or hereafter required of his office by law." The petition alleges a breach of the conditions of the bond in the following language: "That on or about the nineteenth day of September, 1885, the said J. C. Kenworthy, as said constable, under color and by virtue of his said office and his official position, did maliciously, unlawfully, and without reasonable or probable cause, and without warrant or any process of any court, arrest the plaintiff, and incarcerate him in the jail of said county, and keep him confined there for the space of about twelve hours, and during one night; that at the time of said arrest, the said defendant, under pretense of necessity, in order to accomplish said arrest, did, without any cause or provocation, and without reasonable or probable cause therefor, brutally, oppressively, maliciously, and unlawfully strike, beat, bruise, and wound with a club the said plaintiff on the head, and severely injure and cut the head of the plaintiff, and cause him great bodily and mental pain and suffering; that, after

he had so arrested and stricken and wounded the plaintiff, the said defendant placed and incarcerated the plaintiff in said jail as aforesaid, without having or procuring any care or attention or medical treatment to be given to the plaintiff or the wounds thus made and inflicted upon him, although the plaintiff was badly cut about and upon the head, and bleeding and suffering severely, but left plaintiff in said jail until the following day before said wound was dressed; that afterwards, and while the said defendant still had the said plaintiff in custody, to wit, September 14, 1885, the said Kenworthy claimed that he arrested the plaintiff because he found him in a state of intoxication, and filed an information against plaintiff, charging him with said offense before one E. D. McNeilan, a justice of the peace in and for said county, and prosecuted the plaintiff on said information for said crime; that the said prosecution is at an end, and the plaintiff has been duly acquitted of said charge; that the said charge and information so made and filed, and said prosecution by said defendant, was false, malicious, and without reasonable or probable cause, and was done by said defendant for the purpose of attempting to cover up and justify his offensive and malicious acts and conduct in arresting and beating the plaintiff as aforesaid, and harassing, annoying, and oppressing the plaintiff."

The jury found a general verdict for the plaintiff, and special findings to the effect that the constable did not believe, and had no probable cause to believe, that plaintiff was intoxicated at the time of the arrest; that he had no probable cause for filing the information; and that he used more force in making the arrest than he was authorized to believe was necessary. The defendant moved the court to arrest the judgment on the following grounds: "1. The petition does not state facts sufficient to constitute a cause of action, in that the petition shows that the defendant J. C. Kenworthy was a trespasser, and not engaged in the line of his official duty in any of the acts complained of in the petition, and hence the sureties on the bond sued on are not liable therefor, and this action on the bond cannot be maintained. 2. The petition and special verdicts show,—1. That the defendant J. C. Kenworthy arrested and imprisoned the plaintiff without a warrant, and filed an information against him for being found in a state of intoxication, and that the defendant Kenworthy

did all that without probable cause, and without believing that the accused was guilty thereof; 2. That in making said arrest, the said J. C. Kenworthy acted maliciously, and used excessive force; 3. That in imprisoning the defendant, and in instituting the criminal proceedings, and in making the arrest, the said J. C. Kenworthy was not actuated by the motives of vindicating or enforcing the law against being found in a state of intoxication, but by some private and malicious purpose; and the sureties on the bond are not liable for such a trespass on the person, nor for such a malicious prosecution, neither being in any manner connected with his duty as constable."

This motion was overruled. The only error assigned by defendants involves the correctness of this ruling.

2. We are of the opinion that the petition alleges a sufficient cause of action against the defendants. The official character of the principal defendant, and that the arrest was made in the discharge of the functions of the office of the constable, are alleged. He was authorized to make the arrest without a warrant: Code, secs. 1548, 4109, 4200. The petition avers that the arrest was made under color and by virtue of the office of constable held by the principal defendant, but shows that it was unlawfully and oppressively made, without probable cause. It is thus shown that he partially, fraudulently, and oppressively discharged the duties of the office in arresting plaintiff. It thus clearly appears, from the allegations of the petition, that the conditions of the bond were violated; and, as plaintiff is the injured party, he may maintain this action to recover on the bond the damages he has sustained.

3. But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was therefore not done in the line of his duty. In truth, his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he of course is not liable. It follows that if defendant's position be sound, no action can be maintained upon

the bond in any case. In support of our conclusions, see *Tie-*
man v. Haw, 49 Iowa, 312.

The judgment of the district court is affirmed.

LIABILITY OF SURETIES ON OFFICIAL BOND, insufficient complaint: *Gerber*
v. Ackley, 37 Ark. 43; 19 Am. Rep. 751; and see *Commonwealth v. Cole*, 7
B. Mon. 250; 46 Am. Dec. 506, and note 509-517; *State v. Hays*, 30 W. Va.
107.

DEMURRER TO ENTIRE COMPLAINT IN ACTION ON OFFICIAL BOND IS
PROPERLY OVERRULED, where, several breaches of the bond being assigned,
some of them are sufficiently certain and definite: *Coleman v. Pike County*,
83 Ala. 326; 3 Am. St. Rep. 746.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

IN RE MORRIS.

[89 KANSAS, 28.]

HABEAS CORPUS. — JURISDICTION OF COURT TO COMMIT CAN BE QUESTIONED ON HABEAS CORPUS; but the regularity of the proceedings cannot be inquired into.

JURISDICTION OF JUDGE CONTINUES UNTIL ALL ORDERS CONCERNING PROPERTY OF EXECUTION DEBTOR HAVE BEEN OBEYED, where proceedings in aid of execution are regularly instituted before him, and the execution debtor is ordered to deliver certain property, and pay certain money to a receiver duly appointed therein.

HABEAS CORPUS. The facts are stated in the opinion.

William Thomson, for the petitioner.

Foster and Wilson, contra.

HOLT, C. A petition was filed in this court on the fourteenth day of February, 1888, on behalf of George W. Morris, for a writ of *habeas corpus*. It sets forth the following facts: On the 2d of September, 1887, an execution was issued out of the district court of Osage County, in the case of *Downer v. Morris*, against this petitioner, and was returned the next day wholly unsatisfied. Thereafter Downer instituted proceedings in aid of execution before Hon. Alexander Blake, probate judge of said county, and after a hearing in the case, he made an order upon the 22d of October, 1887, which was served upon the petitioner on the day following. Said order directed Morris to deliver certain property to S. H. Fuller, sheriff of

Osage County, who had been duly appointed receiver in the action, and to pay him the sum of \$1,131 in money. Morris turned over to the sheriff all the personal property mentioned in the order, but failed to pay him \$1,131, or any part thereof. The property so turned over was applied in satisfaction of the judgment of Downer against Morris, but there still remained unpaid thereon the sum of seventy-seven dollars and costs; thereafter, on the 29th of November, 1887, the said probate judge issued his warrant and brought Morris before him for an opportunity to show cause why he should not be punished as for contempt in not obeying the order of the court; after a hearing, the judge sentenced Morris to confinement in the jail of said county until he should comply with said order. The petitioner immediately applied for a writ of *habeas corpus* to the judge of the twenty-first judicial district, and after a hearing was released. Afterward, without any further service or notice upon Morris, the probate judge made an order that he should pay over to the receiver the sum of seventy-seven dollars, the balance of the judgment, and certain definite amounts as costs, both in the original action of Downer against Morris, and also in the proceeding then pending before him. A copy of this order was served upon the petitioner on the second day of January, 1888, and on the eighth day of February he issued a warrant under which Morris was arrested and brought before said probate judge, and after hearing, he was committed to the jail in Osage County as for a contempt. The petitioner alleges that this confinement is illegal,—1. Because the court had no power to make the order directing him to turn over the amount of seventy-seven dollars on the judgment, and the other amounts as costs, and therefore had no power to commit him to jail for failing to obey it; 2. Because this matter had already been once determined before the district judge upon *habeas corpus*, and he had been released. There is no complaint about the form of the *mittimus*.

The first inquiry we can make is, whether the probate judge was clothed with authority in this case. Ordinarily, the probate judge can exercise jurisdiction in proceedings in aid of execution: *In re Johnson*, 12 Kan. 102; *State v. Gurnee*, 14 Id. 111. One of the questions which arises between an individual applying for a writ of *habeas corpus* and any one denying its validity, is the authority of the court to commit. We can question any defects which affect the jurisdiction of the court or officer, and which would render the proceedings void. The

jurisdiction having been established, we cannot then inquire into the regularity of the proceedings. If there have been errors committed, even flagrant ones, the remedy for correcting them is not to be found in proceedings in *habeas corpus*. This writ was never designed to be of the nature of a writ of error, by which the errors or irregularities of judgment should be revised: *In re Petty*, 22 Kan. 477; *In re Rolfs*, 30 Id. 758; *People v. Sheriff of New York*, 29 Barb. 622; *Church on Habeas Corpus*, sec. 363.

It is to be presumed that all the steps taken in aid of execution were regular, and that the receiver was duly appointed. The probate judge had jurisdiction, not only to make the order to compel the defendant in that action to turn over property and pay money to the receiver, but also to exercise his authorized powers until all of the debt should have been paid. The object and end of the proceeding was to obtain satisfaction of a judgment against Morris. The judge did not lose his jurisdiction of the case by making the order turning over the property of Morris, and directing the payment of \$1,131 to the receiver, but still possessed plenary powers to compel him to obey the orders made for the purpose of satisfying the execution issued against him: *People v. Mead*, 29 How. Pr. 360; *Webber v. Hobbie*, 13 Id. 382.

The making of the order of December 28th without additional notice upon Morris was an irregularity,—a flagrant error,—and one that certainly cannot be approved; yet it is such an error that it cannot properly be inquired into in this matter. The judge had the power to make it; he exercised such power, and of its exercise we have no control or revision in this proceeding: *Davison's Case*, 13 Abb. Pr. 129. It is claimed that Morris established by a preponderance of the evidence that it was a physical impossibility for him to pay the money; the probate judge determined otherwise, and we cannot inquire into his judgment here: it is conclusive.

The second ground, that there is *res judicata*, owing to the release of the prisoner by Judge Spilman, is not tenable. This is not the order that he failed to obey, for which he was committed in November; it is a new order, and the judge had the power to enforce it without any regard whatever to the proceedings previously had, so far as the petitioner's release from custody was concerned.

We recommend that the prisoner be remanded.

By the COURT. It is so ordered.

A WRIT OF HABEAS CORPUS CANNOT PERFORM THE FUNCTIONS of a writ of error in relation to proceedings of a court within its jurisdiction: *State v. Galloway*, 5 Cold. 326; 98 Am. Dec. 404, and cases collected in note 414; *Sennott's Case*, 146 Mass. 489; 4 Am. St. Rep. 344, and note 348. But the constitutionality of an act under which a party has been convicted may be inquired into on *habeas corpus*: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901, and note 903; *Smith v. State*, 85 Ala. 341. A party convicted of an offense by a court having jurisdiction of his person and of the offense for which he was tried cannot be discharged on *habeas corpus* because of errors of law committed by the trial court: *Ex parte Lehmkuhl*, 72 Cal. 53. The writ of *habeas corpus* cannot be converted into a writ of error; its object is to set free from unlawful custody; to require the custodian to show his authority for imprisonment; and if the detention is by virtue of process, nothing will be inquired into under the writ of *habeas corpus* but the validity of the process upon its face, and the jurisdiction of the court which issued it: *State v. Neel*, 48 Ark. 283. If an indictment is defective, but enough appears to retain the accused in custody, he should not be discharged upon writ of *habeas corpus*: *Ex parte Kitchen*, 19 Nev. 178.

THE JURISDICTION OF A COURT IS NOT EXHAUSTED until its judgment is satisfied: *Dorr v. Rohr*, 82 Va. 359; 3 Am. St. Rep. 106.

BROWN v. CITY OF ATCHISON.

[89 KANSAS, 37.]

CONTRACT BY CITY, AND ADDITIONAL BONDS ISSUED AND DEPOSITED BY IT THEREUNDER, ARE BOTH VOID, where a city in Kansas refunds a portion of its outstanding bonded indebtedness at sixty cents on the dollar, under chapter 89 of the laws of 1877, which permits it to refund such indebtedness at that rate only, and at the same time, and as a part of the same transaction, it enters into a contract with the holders of the original bonded indebtedness to issue still other and additional bonds on the same bonded indebtedness, and to deposit such additional bonds with a third party to be afterwards delivered to the holders of the original bonded indebtedness, and to become valid and binding instruments upon certain contingencies; nor are they valid under chapter 50 of the laws of 1879, because the bonds were not issued in conformity with that act; nor valid under chapter 67 of the laws of 1873, because the city council never took action as provided under such act, and the bonds were not issued thereunder.

PARTY WHO RECEIVES BENEFIT UNDER CONTRACT ENTERED INTO IN GOOD FAITH BETWEEN CORPORATION, PUBLIC OR PRIVATE, AND INDIVIDUAL, but which contract is void in whole or in part because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which it was entered into, but which is not immoral, inequitable, or unjust, and which is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance, over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, will be required to do equity toward the other party, by either rescinding the contract and placing

him *in statu quo*, or by accounting to him for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit.

MUNICIPAL CORPORATION WILL BE REQUIRED TO ACCOUNT TO HOLDERS OF ORIGINAL BONDED INDEBTEDNESS FOR ALL BENEFITS RECEIVED BY IT UNDER CONTRACT to re-fund the bonds, which is void because of a want of power on the part of the corporation to make it in the form in which it was made, where the contract is not inequitable or unjust, or otherwise illegal, and has been performed by such holders, and under which the corporation has received benefits which it might lawfully have received, and for which it has rendered no equivalent.

ACTION brought by the city of Atchison against William Hetherington and Webster W. Hetherington, partners, doing business under the name of William Hetherington & Co., to have certain bonds issued by the city of Atchison, twenty in number, and each for five hundred dollars, aggregating ten thousand dollars, canceled and declared void for illegality and want of consideration. The defendants answered that they had no interest in the bonds except as trustees, and prayed that J. P. Brown and Frank Bier, partners as Brown and Bier, the real owners, be made parties. Brown and Bier were made defendants, and filed an answer and cross-petition, in which they alleged that on August 23, 1879, they owned bonds of the city of Atchison to the amount of \$49,943.95, which by agreement with the city were re-funded at the rate of sixty cents on the dollar, they receiving in re-funding bonds \$29,950, and in money \$16.37. At the same time, and as a part of the same transaction, they entered into a contract with the city, by which the bonds in question, to the amount of ten thousand dollars, were issued by the city, and deposited with William Hetherington & Co., as trustees, to be held by them subject to certain conditions and contingencies. The defendants, Brown and Bier, alleged that the city had violated the contract, and prayed that it specifically perform the same, and issue further bonds to them to the amount of \$19,977.58, with interest, or that judgment be rendered in their favor for that amount; or if such judgment could not be rendered, then that judgment be given in their favor for the sum of \$70,000, or that the city return to them the original bonds and coupons delivered by them to the city. Judgment was rendered in favor of the plaintiff, and the defendants, Brown and Bier, bring error. The contract in question between the city and Brown and Bier recited that Brown and Bier held bonds of the city to the amount of \$49,943.95, and had accepted an

offer of the city to compromise the same upon the following terms: "1. The said city of Atchison is to deliver to said Brown and Bier re-funding bonds of the city of Atchison in an amount equal to sixty per cent, as aforesaid, of the said sum of \$49,943.95, the receipt of which said re-funding bonds is hereby acknowledged; 2. If the said city of Atchison shall at any time within five years from this date compromise any of its bonded indebtedness now outstanding by issuing re-funding bonds of said city in any amount in excess of sixty cents, as aforesaid, on the dollar, on any bond compromised, or shall levy or cause to be levied a tax to pay any amount due in excess of sixty per cent thereof, then and in that event the said city of Atchison is to issue and deliver to Brown and Bier re-funding bonds of the city of Atchison in an amount equal to what such per cent in excess of sixty per cent on any bonds so compromised would amount to on the sum of \$49,943.95, and interest on such excess at seven per cent, from July 1, 1879"; and proceeded: "For the purpose of fulfilling the terms and conditions of this agreement obligatory upon the said city of Atchison, the said city of Atchison has caused to be issued and properly executed ten thousand dollars of the re-funding bonds of said city, a schedule of which is hereto attached as part hereof; and by agreement of the parties hereto, the said city of Atchison has deposited said ten thousand dollars of re-funding bonds of said city so executed and issued as aforesaid with William Hetherington & Co., of the city of Atchison, in escrow, there to remain for and during the period of five years from date thereof, unless sooner delivered to said Brown and Bier under the terms of this agreement; that is to say, that if the said city of Atchison shall at any time before the expiration of five years from date hereof compromise any of its outstanding bonded indebtedness at any sum in excess of sixty cents, as aforesaid, on the dollar, or shall at any time within such period levy or cause to be levied a tax to pay any bonds, coupons, or judgments against the city on any of its outstanding bonds or coupons in excess of sixty per cent, as aforesaid, of the amount due thereon, then and in that event the said William Hetherington & Co. are authorized to deliver to the said Brown and Bier, out of the said bonds so deposited with them under this agreement, such an amount thereof of the face value equal to what such per cent in excess of sixty per cent would amount to on the sum of \$49,943.95, and interest on such excess at seven per cent, from July 1,

1879. And it is further agreed that the condition upon which said Hetherington & Co. shall deliver said bonds to Brown and Bier under this contract shall be the official records of said city of Atchison, if said city shall keep a record of each compromise of said bonds. Should the city of Atchison levy tax to pay interest on bonds, judgments, and coupons, then the record of such levy shall be the evidence. Said Hetherington & Co. shall give written notice to the mayor of said city at least ten days before any bonds shall be delivered under this agreement. This contract shall not remain in force beyond the expiration of five years from date hereof, at which time all such bonds deposited with said William Hetherington & Co., under this agreement, not used under the terms hereof, shall be surrendered to said city for cancellation. It is further mutually agreed between the parties hereto that said Brown and Bier and the said city of Atchison shall act in good faith toward the other as to the subject-matter hereof, and the said Brown and Bier agree that they will not in any way interfere with the said city of Atchison in its attempt to compromise its outstanding indebtedness, and further agree that they will faithfully labor to bring about and effect a compromise of the indebtedness of said city, at a sum not to exceed sixty cents, as aforesaid, on the dollar, at the earliest practical period, and should they fail to do so, they forfeit all right under this contract, and said bonds shall be returned to said city of Atchison upon demand therefor; but the said Brown and Bier do not obligate themselves to effect any settlement of said indebtedness."

B. P. Waggener, for the plaintiffs in error.

W. R. Smith, city attorney, and *S. Heath*, for the defendant in error.

VALENTINE, J. On August 23, 1879, Brown and Bier owned bonds of the city of Atchison, which was then a city of the second class, amounting in the aggregate, principal and interest, to the sum of \$49,943.95, which by an agreement with the city were re-funded at the rate of sixty cents on the dollar, Brown and Bier receiving in new or re-funding bonds \$29,950, and in money \$16.37. Also, as a part of the same transaction, other new or re-funding bonds to the amount of ten thousand dollars were issued by the city of Atchison, and deposited with William Hetherington & Co., as trustees, to be held by them

in escrow for a time not exceeding five years, subject, upon certain conditions and contingencies set forth in a written contract made between the parties at the same time, and as a part of the same transaction, to be finally delivered in whole or in part to Brown and Bier, or to be returned in whole or in part to the city of Atchison, such delivery or return to depend entirely upon the conditions and contingencies set forth in said contract. All these new or re-funding bonds, the ones deposited with William Hetherington & Co. as well as the others, as is shown upon their face, and as is also shown by the findings of the court below, were issued under chapter 89 of the laws of 1877. That chapter, so far as it is necessary to quote it, reads as follows:—

“Section 1. Every city of the second and third class is hereby authorized to take up and re-fund all its matured and maturing bonds issued on account of any subscription to the capital stock of any railroad company, or for any other purpose, including all accrued interest thereon, and judgments rendered on any such bonds, and interest.

“Sec. 2. The bonds issued under this act shall be at the rate of not exceeding sixty cents for each dollar of said indebtedness, and shall bear seven per cent interest per annum, payable semi-annually, on the first day of January and July of each year, with proper coupons attached for such interest; be signed by the mayor and clerk, and attested with the seal of the city. . . . Said bonds shall be due and payable twenty years after date thereof.”

The first question presented in this case is, whether the aforesaid written contract is valid or not. Is it valid under the act under which the new bonds were issued? In our opinion, it is not. Under that act, a city is not authorized to issue re-funding bonds at a rate greater than sixty cents on the dollar. Under that act, it would seem that all re-funding bonds issued in excess of sixty cents on the dollar, and all contracts therefor, with or without reference to any conditions or contingencies, would be void. It would, therefore, seem that all that part of the aforesaid contract providing that bonds might be issued or delivered in excess of sixty cents on the dollar is void; and the bonds themselves so issued are also void. And further, the natural tendency of the aforesaid contract would be to prevent the city from compromising or re-funding any of its remaining bonded indebtedness at a rate exceeding sixty cents on the dollar, notwithstanding the fact

that chapter 50 of the laws of 1879, which was then in force, provides that any city may compromise and re-fund any of its indebtedness at an amount greater or less than sixty cents on the dollar, and in an amount up to the actual amount of the indebtedness. If this contract is valid, then its tendency would be to virtually repeal the foregoing statute, so far as the city of Atchison is concerned: See also section 36 of the second-class-city act, as amended by section 1, chapter 67, laws of 1873. Also, the tendency of the contract would be to prevent the city of Atchison from levying a tax to pay any amount due on its outstanding bonded indebtedness in excess of sixty per cent thereof. This is also in contravention of law, and against public policy; for every holder of every one of the city's bonds had the unimpeachable right to require that the city should levy an amount of tax sufficient to pay the entire amount of his bond, and no bond-holder was required, by any law, to compromise with reference to his bond or bonds, or to take anything less for his bond or bonds than the full face value thereof, with all the interest thereon. It was always purely discretionary with every bond-holder as to whether he would accept any proffered compromise or not, or any proffered privilege of re-funding his bond or bonds or not, or whether he would require payment thereof according to the very terms thereof. And it will be presumed that the bondholders would always consult their own best interests in all transactions of this kind.

But it is claimed that if the contract and bonds would be void under chapter 89 of the laws of 1877, still that they are valid under chapter 50 of the laws of 1879. To this it may be answered that they were not made or issued under that act, but were made and issued under the act of 1877, but in violation of some of the provisions of both acts. There are many differences existing between the two acts. The act of 1877 provides for re-funding bonds by issuing others in their place at a rate not to exceed sixty cents on the dollar, due in twenty years, and drawing interest at the rate of seven per cent per annum. The act of 1879 provides for compromising and re-funding any kind of indebtedness by issuing re-funding bonds at any rate not exceeding the actual amount of the indebtedness, due at any time agreed upon, not exceeding thirty years, and drawing interest at any rate not to exceed six per cent per annum; and the re-funding bonds must contain a recital that they were issued under the act of 1879; and when

they are issued, the transaction is closed; and if they are issued at a rate not exceeding sixty-five per cent of the indebtedness, the city, in that case, shall never increase its indebtedness beyond the amount of the re-funding bonds until they are paid or liquidated, and any indebtedness created over and above the "amount of the re-funding bonds shall be absolutely null and void." It will be seen that there are many advantages and many disadvantages in re-funding under one act or under the other, and a great room for choice. Brown and Bier, however, chose to re-fund under the act of 1877, and in doing so they failed in several particulars to comply with the provisions of the act of 1879. They took re-funding bonds drawing interest at the rate of seven per cent per annum, when the act of 1879 says the interest shall not exceed six per cent per annum. The act of 1879 provides that the bonds "shall contain a recital that they are issued under this act." The bonds in the present case contain a recital that they were issued under the act of 1877. The act of 1879 contemplates that when the bonds are issued the transaction shall be closed, and that the city shall not further increase its indebtedness where the original indebtedness was re-funded at sixty-five per cent or less; but the transaction in this case was upon the theory that the transaction was not closed when the bonds were issued, and that the city should still further increase its indebtedness by delivering, upon certain contingencies, ten thousand dollars more in bonds to the original holders of the indebtedness. Under section 5 of this act of 1879, any such increase is void.

But it is urged by the plaintiffs in error that even if the contract and the bonds in controversy would be void under the aforesaid statutes of 1877 and 1879, still that they are valid under section 36 of the act relating to cities of the second class as amended in 1873: Laws of 1873, c. 67, sec. 1. We think this is also a mistake. That section provides, among other things, as follows: "The [city] council may appropriate money, and provide for the payment of the debts and expenses of the city, and, when necessary, may provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created," etc.

The city council of Atchison, however, never took any action under this section. It never even attempted to "provide for issuing bonds" under this section. But it expressly provided, by an ordinance passed April 17, 1878, for re-funding

bonds under chapter 89 of the laws of 1877, and under no other act, and the entire transaction in the present case was had under that ordinance and under the act of 1877, and under no other act or ordinance relating to the funding or re-funding of indebtedness. We think the aforesaid contract, and the ten thousand dollars in bonds issued thereunder, and deposited with William Hetherington & Co., are void under section 36 of the second-class-city act, as well as under the other acts of the legislature.

But it is further claimed that even if the said contract is void under the statutes, and even if the bonds for ten thousand dollars issued under it and deposited with William Hetherington & Co. are void, still that, in this action, and upon general principles of law and equity, Brown and Bier are not utterly destitute of all right to relief. It is claimed that, under the circumstances of this case, and upon general principles of law and equity, Brown and Bier are entitled to full and complete relief under their contract. It is urged that as this is an action in the nature of a suit in equity; as the entire transaction between Brown and Bier and the officers of the city of Atchison was in good faith, and found to be in good faith by the court below; as Brown and Bier parted with and delivered to the city of Atchison good and valid bonds of the city, amounting in the aggregate, principal and interest, to \$49,943.95, and received in return therefor, in bonds and money, only \$29,966.37, thereby delivering to the city of Atchison \$19,977.58 more than they received in return from the city, and all this upon the honest belief and the faith thereof that the aforesaid contract was valid and would be scrupulously kept and fulfilled by the city, and that they, Brown and Bier, would be treated as favorably as the most favored person or persons who might afterward return to the city city bonds for re-funding; as the contract has been wholly fulfilled and executed on the part of Brown and Bier; as there is nothing unjust or immoral in the contract; and as the city has received from Brown and Bier \$19,977.58 in good and valid bonds, for which it has paid no equivalent,—the city is now bound to fulfill its contract, or at least, before it can obtain equitable relief by having the bonds in controversy delivered up to it to be canceled and held for naught, it must do full and complete equity in the premises as toward Brown and Bier. It is claimed that before the city of Atchison can have the bonds in controversy set aside or canceled, it must either place Brown and Bier in the same situa-

tion and condition occupied and sustained by them before the aforesaid transaction was had at all, by returning to them their original bonds in the same condition in which they were when Brown and Bier delivered them to the city, or that the city must otherwise do equity by placing Brown and Bier in as favorable a situation as they expected to be placed in by virtue of the provisions and conditions of the aforesaid contract. After the aforesaid contract was made, and within less than five years thereafter, the city of Atchison compromised and re-funded about one hundred and fifty thousand dollars of its bonded indebtedness which had existed and was outstanding prior to the time when said contract was executed, by issuing new and re-funding bonds for the full face value of the old bonds which it re-funded, the new bonds to be due and payable in thirty years, and to draw interest payable semi-annually at the rate of four per cent per annum. These new bonds and the issuing thereof were legal and valid at the time of the issuing thereof, and such bonds might have been legally issued at any time from the time when the aforesaid contract was executed up to the time when they were in fact issued, and that kind of bonds, that is, four-per-cent re-funding bonds running thirty years for the full amount of the old indebtedness, might legally have been issued to Brown and Bier at the time when said contract was executed, instead of the seven-per-cent re-funding bonds running twenty years for sixty per cent of the old indebtedness, which were actually issued to them. Now, it would seem that in equity, and within the scope and spirit of the aforesaid contract, Brown and Bier ought to be placed in as favorable a situation or condition as those whose bonds were afterward legally re-funded at their full face value, by the issuance of other bonds running thirty years, and drawing interest at the rate of four per cent per annum; and this should be the judgment of the court, if the rules of law and equity in cases of this kind will permit. No authorities precisely in point can be found, but many authorities lend support to the above views. In the case of *Hitchcock v. City of Galveston*, 96 U. S. 341, 350, 351, the following language is used: "In the view which we shall take of the present case, it is, perhaps, not necessary to inquire whether those cases justify the court's conclusion, for if it were conceded that the city had no lawful authority to issue the bonds described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plain-

tiffs have no rights under it. They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract, the city has broken it. It matters not that the promise to pay was in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful. . . . Having received benefit at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

In the case of *City of Parkersburg v. Brown*, 106 U. S. 487, 503, the following language is used: "But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property, and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act: 2 Comyn on Contracts, 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose the value of that which it has actually received."

In the case of *Chapman v. County of Douglas*, 107 U. S. 348, 355, where the county of Douglas, Nebraska, entered into an unauthorized contract for the purchase of a poor-farm, and when the purchaser or his assigns attempted to enforce the collection of the notes executed in payment for the farm, the

county resisted payment on the ground that the contract was unauthorized, but the supreme court of the United States held the county liable, and in the opinion of the court used the following language: "The agreement, as we have assumed, so far as it relates to the time and mode of payment, is void; but the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county. As the agreement between the parties has failed by reason of the legal disability of the county to perform its part according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown."

In the case of *Railroad Co. v. Howard*, 7 Wall. 392, 413, the supreme court of the United States uses the following language: "Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements, and then turn around and disavow their acts, and defeat the just expectations which their own conduct has superinduced."

In the case of *Township of Pine Grove v. Talcott*, 19 Wall. 666, 678, and in the case of *National Bank v. Matthews*, 98 U. S. 621, 629, the supreme court of the United States approvingly refers to the following language used by Mr. Sedgwick in his work on statutory and constitutional law: "It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception that, although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains. And the principle of this exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note upon the ground that the savings bank was prohibited by its charter

from making loans of that description": Sedgwick's Statutory and Constitutional Law, 2d ed., 73.

In the case of *Argenti v. City of San Francisco*, 16 Cal. 255, 282, 283, the following language is used: "If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not in fact make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability upon an implied contract, and it is no answer to a claim resting upon a contract of this nature to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of fifty thousand dollars prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. It would be indeed a reproach to the law if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness."

In the case of *Pimental v. City of San Francisco*, 21 Cal. 351, 361, 362, the following language is used: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it from this general obligation. If she obtain other property which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor from the like obligation: *Argenti v. City of San Francisco*, 16 Cal. 282. The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

In the case of *Paul v. City of Kenosha*, 22 Wis. 266, 272 94 Am. Dec. 598, where the plaintiff had purchased certain bonds of the city which were void for want of power to issue

them, it was held that he was entitled to recover the amount paid, and the following, among other language, was used by the court: "The city has had that amount of money and legal scrip for its city bonds, which turn out to be of no value whatever. It seems to fall under the general rule of law, that where a party sells an obligation which turns out to be valueless, and not of such a character as he represents it to be, he is liable to the vendee as upon a failure of consideration. The city bonds, it appears, were void when the agents of the city sold them to the plaintiff. Is it just and equitable that the city retain the money which it has received for its own worthless bonds?"

In the case of *Whitney Arms Co. v. Barlow*, 63 N. Y. 63, 70, 20 Am. Rep. 504, it is held as follows: "The plea of *ultra vires*, as a general rule, will not prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong. . . . It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation."

In the case of *Memphis etc. R. R. Co. v. Dow*, 19 Fed. Rep. 388, 398, the court says: "The decided weight of modern authority favors the conclusion that neither party to a transaction *ultra vires* will be permitted to allege its invalidity while retaining its fruits."

In the case of *Hays v. Galion G. L. & Coal Co.*, 29 Ohio St. 330, 340, the following language is used: "The rule seems well established that where a contract has been executed and fully performed on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company." Also see the case of *Hamilton etc. Hydraulic Co. v. Cincinnati etc. R. R. Co.*, 29 Id. 341.

In the case of *Thompson v. Lambert*, 44 Iowa, 239, 248, the court says: "As we understand, the rule *ultra vires* pre-

vails in full force only where the contracts of corporations of this character remain wholly executory. . . . This rule prevails even as to public or municipal corporations in analogous cases."

Mr. Morawetz, in his work on private corporations, states the rule as follows:—

"After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensation for a breach of the contract by the other party": Morawetz on Corporations, heading to sec. 689.

"The general rule is, that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case": Morawetz on Corporations, sec. 721.

Mr. Kerr, in his work on fraud and mistake, page 398, uses the following language: "If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired." See also 2 Dillon on Municipal Corporations, 3d ed., secs. 938, 959, et seq. See also the following cases: *Maduska v. Thomas*, 6 Kan. 153; *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656; *Parish v. Wheeler*, 22 N. Y. 494; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 661; 19 Am. Rep. 781; *Morville v. American Tract Soc.*, 123 Mass. 129, 137; 25 Am. Rep. 40; *Clark v. Saline County*, 9 Neb. 516, 523; *Town of Searcy v. Yarnell*, 14 Am. & Eng. Corp. Cas. 523; *State Board of Agriculture v. Citizens' Street Railway Co.*, 47 Ind. 407; 17 Am. Rep. 702.

Other authorities of a similar character might be cited, but we think the foregoing are sufficient. From the authorities we think the following principle may be deduced: Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party, by either rescinding the contract and placing the other party *in statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit. It must be remembered that, in this case, the city had the power to re-fund its outstanding bonded indebtedness in three ways: 1. By issuing, as it did to Brown and Bier, new seven-per-cent bonds, running twenty years, for an amount not exceeding sixty per cent of the old bonded indebtedness; 2. By issuing new bonds, drawing interest not to exceed six per cent per annum, running not to exceed thirty years, and for an amount not exceeding the face value of the old bonded indebtedness; 3. By issuing new bonds, drawing interest not to exceed ten per cent per annum, running not less than ten nor more than twenty years, and for the full face value of the old indebtedness.

Hence it will be seen that the city had the power to re-fund bonds on better terms than those terms on which it re-funded Brown and Bier's bonds, and hence in this sense the contract entered into between the city and Brown and Bier was not illegal nor against public policy. Under section 36 of the second-class-city act, Brown and Bier might lawfully have had their bonds re-funded at their full face value, and drawing interest at the rate of ten per cent per annum, if the city had chosen to so re-fund them. But the city did not so choose. It, through its council, never even gave its officers authority to so re-fund them or to so re-fund any other

bonds. Now, while the aforesaid contract and the bonds issued under it and deposited with William Hetherington & Co. are void, yet, as the city has received a benefit under such contract, and a benefit which it could legally receive, and a benefit which it would not have received except for such contract, and a benefit for which it has rendered no equivalent, we think it should be required to account to Brown and Bier for the same; and probably the only relief which Brown and Bier now obtain under the circumstances of this case is a judgment for the difference in value between the refunding bonds which were actually issued to and received by them, and an amount of four-per-cent bonds, running thirty years, equal to the full face value of the bonds which they surrendered to the city to be re-funded. And in such a case, the bonds deposited with William Hetherington & Co. should be returned to the city to be canceled.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

MUNICIPAL BONDS ISSUED IN EXCESS of the number and amount authorized by law are void: *Sutro v. Petit*, 74 Cal. 332; 5 Am. St. Rep. 442; and see *De Voss v. Richmond*, 18 Gratt. 338, 98 Am. Dec. 664, where the subject of defenses to actions upon municipal bonds is fully discussed; *Bissell v. City of Kankakee*, 64 Ill. 249; 16 Am. Rep. 554; *McPherson v. Foster*, 43 Iowa, 48; 22 Am. Rep. 215.

THE PURCHASER FROM A CITY OF BONDS WHICH ARE VOID for want of power to issue them, may recover the amount paid as for a failure of consideration: *Paul v. Kenosha*, 22 Wis. 266; 94 Am. Dec. 598; and see *De Voss v. Richmond*, 18 Gratt. 338; 98 Am. Dec. 664, note.

WEST v. WESTERN UNION TELEGRAPH COMPANY.

[39 KANSAS, 93.]

ONE FOR WHOSE BENEFIT CONTRACT IS MADE WITH ANOTHER MAY MAINTAIN ACTION THEREON in his own name against the promisor.

ACTION FOR BREACH OF CONTRACT FOR NEGLIGENT FAILURE TO TRANSMIT AND DELIVER MESSAGE MAY BE MAINTAINED AGAINST TELEGRAPH COMPANY by one to whom the message is sent, and the actual damages sustained, including the money paid for the transmission of the message, recovered, where, although the sender had no authority to send the message, it was for the benefit of the plaintiff, and the plaintiff returned the money paid for the transmission, and fully ratified the transaction.

EXEMPLARY DAMAGES MAY BE RECOVERED AGAINST TELEGRAPH COMPANY for failure to transmit and deliver message, where there is such gross negligence on the part of the agents of the company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message.

DAMAGES FOR MENTAL SUFFERING FOR INJURIES CAUSED PLAINTIFF BY NEGLIGENCE OF DEFENDANT MAY BE RECOVERED, where mental suffering is an element of physical pain, or is the natural and proximate result of the physical injury.

DAMAGES FOR MENTAL ANGUISH OR SUFFERING OCCASIONED BY FAILURE OF TELEGRAPH COMPANY TO TRANSMIT AND DELIVER MESSAGE ANNOUNCING DEATH of the plaintiff's brother, and the consequent delay in the announcement, whereby the plaintiff could not attend the funeral, cannot be recovered.

ACTION for damages. The facts are stated in the opinion.

Jetmore and Son, for the plaintiff in error.

J. B. Johnson, for the defendant in error.

HORTON, C. J. This was an action brought by George West against the Western Union Telegraph Company to recover ten thousand dollars damages, occasioned, as claimed in the petition, by the gross and malicious negligence of the company to transmit and deliver the following telegraphic message:—

“NORTH TOPEKA, KANSAS, September 14, 1885.

“To GEORGE WEST, Delphos, Kansas, care Post-office.

“Uncle Sam died last night; funeral Wednesday.

“JOHN G. WEST.”

Upon the trial, after the plaintiff had closed his evidence, the telegraph company interposed, and filed a demurrer thereto, upon the ground that no cause of action was proved. The court sustained the demurrer. The plaintiff excepted, and brings the case here for review.

The testimony introduced tended to show that the foregoing written message was handed by John West, the son of George West, to the agent of the telegraph company, at its office at North Topeka, on the afternoon of its date, with directions “to forward it immediately”; that the message was ordered by John West to be sent for the benefit of his father; that he paid the agent forty cents for sending the message; that subsequently his father repaid to him the money; that Delphos is about one hundred miles west of North Topeka; that at the date of the message, and subsequently, it was operating a telegraph line for hire between the towns of North Topeka and Delphos, with an office in each town; that George West has resided in Kinmundia, Illinois, since 1859; that in September, 1885, he was visiting in Kansas, and at the date of the message, and for several days thereafter, was with friends in the neighborhood of Delphos; that Samuel C. West was

his oldest brother, and after his death that he had no other brother living; that Samuel lived at Philadelphia, Pennsylvania, and at the time of his death was seventy-eight years of age; that George West was seventy-three years of age; that he was expecting to hear of the death of his brother, on account of his ill health, and was anxious to attend his funeral, if notified in time; that while in Kansas he had so fixed his matters as to start at a moment's warning to attend the funeral; that on September 14, 1885, he inquired at the post-office at Delphos for his mail, but did not receive the telegram; that he inquired frequently afterward, and sent others to inquire for his mail, but never received the telegram; that subsequently he learned by a letter from his son John of the death of his brother Samuel, but the information came too late for him to attend the funeral; that if he had received the telegram within a reasonable time after it had been sent, he could have attended the same; that his son John informed the agent at the office of the telegraph company in North Topeka that the message had never been delivered; that George West also inquired at the office of the telegraph company at Delphos on the morning of the 18th of September for the telegram; that the agent said that none had been received for him; that he then told the agent "he would investigate the matter," and he replied "he had received none, and that none could have been received without his knowing it"; that both George West and John West were informed by the agent at North Topeka that the message had been sent over the wire at its date to Delphos; that the telegram was never delivered to the post-office at Delphos, or to George West, by the agent of the telegraph company, or any one else.

Upon what grounds the trial court sustained the demurrer to the evidence is not clearly disclosed. In our opinion, the demurrer should have been overruled, as there was ample evidence introduced for the case to go to the jury. The message was written and delivered at the office in North Topeka, and paid for by John West, the son of the plaintiff, for the benefit of the latter. Subsequently, George West returned to his son the money paid by him to the telegraph company, and ratified and approved his son's acts in the transaction, in all respects as if the message originally had been written and sent under his direction. In *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, it was held that "a person for whose benefit a promise to another, upon a sufficient consideration, is made may main-

tain an action on the contract in his own name against the promisor." In *Dresser v. Wood*, 15 Kan. 344, it was held "that where an action is commenced by an attorney at law, without the knowledge or consent of the plaintiff, the plaintiff may afterward ratify the same, and thereafter be entitled to all its benefits." The contract, therefore, made by the son with the telegraph company, for the benefit of his father, which was afterward approved and ratified by the father, was sufficient as the basis of this action. The plaintiff, upon the evidence introduced, was entitled to recover judgment against the defendant for his actual damages, including the forty cents paid for the transmission of the message: *Western Union Tel. Co. v. Howell*, 38 Kan. 685; *Western Union Tel. Co. v. Crall*, 38 Id. 679; *Logan v. Telegraph Co.*, 84 Ill. 468.

Further than this, if upon another trial it shall be established that there was such gross negligence on the part of the agents of the telegraph company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message, then the plaintiff would be entitled to exemplary damages. Such damages are given more to punish the wrongdoer than to recompense the party injured: *Scott and Jarnagin on Telegraphs*, secs. 417, 418; *Southern Kansas R'y Co. v. Rice*, 38 Kan. 398, and cases cited therein. In *Schippel v. Norton*, 38 Id. 567, we recently held where no actual damage is suffered, no exemplary damages can be recovered; but as actual damages are shown in this case, that decision is not applicable.

It seems, however, to be claimed upon the part of the plaintiff that he is entitled to recover for his mental anguish or suffering occasioned by the delay in the announcement of the death of his brother. Where mental suffering is an element of physical pain, or is a necessary consequence of physical pain, or is the natural and proximate result of the physical injury, then damages for mental suffering may be recovered, where the injury has been caused by the negligence of the defendant; but in an action of this kind, we do not think that damages for mental anguish or suffering can be allowed. "Such damages can only enter into and become a part of the recovery where the mental suffering is the natural, legitimate, and proximate consequence of the physical injury": *City of Salina v. Trosper*, 27 Kan. 544. The general rule is, "that no damages can be recovered for a shock and injury to the feelings and sensibilities, or for mental distress and anguish

caused by a breach of the contract, except a marriage contract": *Russell v. Western Union Tel. Co.*, 3 Dak. 315. In *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, it was decided that an action for mental suffering alone can be maintained. The opinion in that case, however, was prepared by a member of the commission of appeals of Texas. And subsequently, in the case of *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, the supreme court of Texas overruled that decision: See also Wood's *Mayne on Damages*, 1st Am. ed., 74.

We also add that the trial court should have permitted the plaintiff to show the arrangements made with his son John to forward to him at Delphos all telegrams and mail matter that came addressed to him at Topeka.

The judgment of the district court will be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed.

A PROMISE MADE BY ONE PERSON TO ANOTHER, FOR THE BENEFIT OF A THIRD PERSON who is a stranger to the consideration, will not support an action by the latter: *Exchange Bank v. Rice*, 107 Mass. 37; 9 Am. Rep. 1; *Rogers v. Union Stone Co.*, 130 Mass. 581; 39 Am. Rep. 478.

DAMAGES RECOVERABLE AGAINST TELEGRAPH COMPANY for failure to deliver a message: *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126, and note 134. In Indiana, it is only the sender of a dispatch who occupies that privity of contract with the telegraph company which is necessary to the maintenance of a suit for the statutory penalty, and this rule is not changed by the phrase, "any party aggrieved," as used in the act of 1885; but as to special damages, a different rule prevails, and an action may be maintained therefor by the person to whom the message is sent: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191.

MENTAL ANGUISH AS ELEMENT OF DAMAGES. — Whether damages for an injury to the mind or feelings can be recovered in actions for the breach of a contract, or for the commission of a tort, is a question that has been frequently discussed. There is no doubt that in an action for breach of promise of marriage the jury may take into consideration "the injury to the plaintiff's feelings, affections, and wounded pride, and the pain and mortification resulting from the breach of contract: Note to *Burnham v. Cornwell*, 63 Am. Dec. 545; *Tobin v. Shaw*, 45 Me. 331; 71 Am. Dec. 547; *Bird v. Thompson*, Mo., Nov. 1888. But for the breach of any other contract, it has been denied that damages for the mental suffering caused thereby can be recovered. Thus in an action against a common carrier of passengers to recover damages for the breach of a contract of carriage, there can be no recovery for annoyance and vexation of mind, mental distress, and sense of wrong: *Walsh v. Chicago etc. R'y*, 42 Wis. 23; 24 Am. Rep. 376, 382. This latter rule has been applied in the principal case, and others, in actions brought against telegraph companies by persons to whom telegrams are sent announcing the sickness or death of relatives, to recover damages for a negligent failure to

transmit or deliver the same: *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *Gulf etc. R'y v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; although there are other cases which hold that injury to feelings may be taken into consideration in the general computation of damages: *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; compare *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805. These telegraph cases are rather actions of tort to recover damages for negligence than actions for the breach of contracts of transmission.

In action for damages on account of the commission of torts, mental anguish is often considered. Thus in an action for an assault and battery, the plaintiff may recover for the injury to his mind and the indignity occasioned by the wrong: *Taber v. Hutson*, 5 Ind. 322; *Cox v. Vanderleed*, 21 Id. 164; *Wolf v. Trinkle*, 103 Id. 355; *McKinley v. Chicago etc. R'y*, 44 Iowa, 314; 24 Am. Rep. 748; *Wadsworth v. Treat*, 43 Me. 163; *Prentiss v. Shaw*, 56 Id. 427; *Smith v. Holcomb*, 99 Mass. 552; *West v. Forrest*, 22 Mo. 344; *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670; *Beck v. Thomson*, W. Va., Sept. 1888; *Craker v. Chicago etc. R'y*, 36 Wis. 657, 17 Am. Rep. 504 (where a conductor kissed a female passenger against her will); and in an action by a passenger for being wrongfully or improperly ejected from cars, he may likewise recover for the injury to his feelings and the humiliation naturally and necessarily resulting from the act: *Smith v. Pittsburg etc. R'y*, 23 Ohio St. 10; *Lake Erie etc. R'y v. Fir*, 88 Ind. 381; *Quigley v. Central Pacific R. R.*, 11 Nev. 350; *Hays v. Houston etc. R. R.*, 46 Tex. 272; *Chicago etc. R. R. v. Flagg*, 43 Ill. 365, 368; 92 Am. Dec. 133; *contra, Illinois etc. R. R. v. Sutton*, 53 Ill. 397. So damages for mental injury may be awarded in an action for a malicious arrest and prosecution: *Fisher v. Hamilton*, 49 Ind. 341; in an action for false imprisonment: *Stewart v. Maddox*, 63 Id. 51; and it is held, in an action for illegally issuing an attachment: *Byrne v. Gardner*, 33 La. Ann. 6; and also, sometimes, in an action for libel or slander: *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420, and note 434, 435, where the subject is discussed.

In actions under statutes for a negligent injury resulting in death, damages for mental anguish or suffering cannot, as a general rule, be recovered: Note to *Carey v. Berkshire R. R.*, 48 Am. Dec. 637; *City of Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago etc. R. R. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; *State v. Baltimore etc. R. R.*, 24 Md. 84; 87 Am. Dec. 600; *Potter v. Chicago etc. R'y*, 21 Wis. 372; 94 Am. Dec. 548; but may be recovered under a few statutes: Note to *Carey v. Berkshire R. R.*, *supra*; *McKeever v. Market Street R. R.*, 59 Cal. 294; *Cleary v. City R. R.*, 76 Id. 240. In an action, however, for a personal injury sustained by the plaintiff himself through the negligence of the defendant or his servants, it is well settled that the jury may take into consideration the plaintiff's mental suffering directly and naturally caused by the injury: *Fairchild v. California Stage Co.*, 13 Cal. 599; *Lawrence v. Housatonic R. R.*, 29 Conn. 390; *Cooper v. Mullins*, 30 Ga. 152; 76 Am. Dec. 638; *Indianapolis etc. R. R. v. Stables*, 62 Ill. 313; *Wright v. Compton*, 53 Ind. 337; *Muldowney v. Illinois Central R'y*, 36 Iowa, 462, 468; *Memphis etc. R. R. v. Whitfield*, 44 Miss. 466; *Porter v. Hannibal etc. R. R.*, 71 Mo. 66; 36 Am. Rep. 454; *Ranson v. New York etc. R. R.*, 15 N. Y. 415; *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290; 3 Am. Rep. 549; *Houston etc. R. R. v. Randall*, 50 Tex. 254, 261; *Ware v. St. Paul Water Co.*, 1 Dill. 465, 468; *Robertson v. Cornelison*, 34 Fed. Rep. 716; *Alexander v. Humber*, Ky., Jan. 1888; especially when there is an element of wantonness: *Hawes v. Knowles*, 114 Mass. 518; 19 Am. Rep. 383. The rule has been

frequently applied in actions against towns, cities, and counties for personal injuries caused by defective bridges, sidewalks, and the like: *Canning v. Inhabitants of Williamsport*, 1 Cush. 451; *Seger v. Town of Barkhamsted*, 22 Conn. 290, 298; *Masters v. Town of Warren*, 27 Id. 293; *Ferguson v. Davis County*, 57 Iowa, 601; *Kendall v. City of Albia*, 73 Id. 241; *Stewart v. City of Ripon*, 38 Wis. 587. But in such actions mental anguish is held not to be a distinct element of damage in addition to bodily suffering: *Johnson v. Wells, Fargo, & Co.*, 6 Nev. 224; 3 Am. Rep. 245; *Joch v. Dankewardt*, 85 Ill. 331; *City of Salina v. Trosper*, 27 Kan. 544; and see further, on the proposition that mental suffering cannot be considered as a distinct element of damage, *Gulf etc. R'y v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, overruling *So Relle v. Western Union Tel. Co.*, 55 Id. 308; 40 Am. Rep. 805.

Again, in such actions to recover damages for negligent personal injuries, it is held to be necessary that the mental suffering should be connected with the bodily injury, and to be fairly and reasonably the natural consequence thereof. Thus physical and mental suffering attending a miscarriage, which was occasioned by the injury, is a proper subject of compensation; but any injured feelings following the miscarriage, and not a part of the pain naturally attending it, are too remote: *Bovee v. Town of Danville*, 53 Vt. 183. So anxiety of mind about the safety of others who may be in danger from the same cause cannot be taken into consideration: *Keyes v. Minneapolis etc. R'y*, 36 Minn. 290; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; and mental suffering arising from apprehension as to the future welfare of the plaintiff's family is not a natural result of the injury, and cannot be considered: *Texas Mexican R'y v. Douglas*, 69 Tex. 694. If no personal injury resulted from the negligent act, the plaintiff's anxiety in relation to his personal safety is not an element of damage: *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303.

If an action is brought by a parent for a negligent injury to his minor child, it is also held that there can be no compensation allowed for the mental suffering which the injury caused the parent: *Flemington v. Smithers*, 2 Car. & P. 292; *Black v. Carrollton R. R.*, 10 La. Ann. 33; 63 Am. Dec. 586; *Pennsylvania R. R. v. Kelly*, 31 Pa. St. 372; *Oakland R. R. v. Fielding*, 48 Id. 323; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303. The same ruling was made in *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 683, in an action brought by a father for an assault and battery committed upon his child; but the contrary was maintained in *Trimble v. Spiller*, 7 T. B. Mon. 394; 18 Am. Dec. 189. In an action by a father for a forcible abduction, however, it is held that the jury may compensate him for the injury done to his feelings: *Magee v. Holland*, 27 N. J. L. 86. So in an action for enticing away the plaintiff's minor daughter: *Stowe v. Heywood*, 7 Allen, 118; and in an action for seduction, "damages are recoverable for wounded honor, injury to the happiness and reputation of the plaintiff's family, and to his feelings as a parent and husband": Note to *Weaver v. Bachert*, 44 Am. Dec. 178; *Stevenson v. Belknap*, 6 Iowa, 97; 71 Am. Dec. 392; *Lunt v. Philbrick*, 59 N. H. 59; *Barbour v. Stephenson*, 32 Fed. Rep. 66.

The rule that the damages must be the natural and proximate consequence of the act complained of will obviously generally prevent mental suffering from being considered in actions concerning property. It has accordingly been held that in an action for forcible entry and detainer, damages are not recoverable for either bodily or mental pain: *Anderson v. Taylor*, 56 Cal. 131; 38 Am. Rep. 52; but damages may be awarded for injury to the plaintiff's feelings in an action of trespass *quare clausum fregit*, where the defendant,

the superintendent of a cemetery, has acted in willful disregard or careless ignorance in disinterring and removing from a lot therein the remains of plaintiff's child: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759; but, on the other hand, it is held that in an action for an injury to the due lateral support of a lot of land designed for a burial place, there can be no recovery for injury to the plaintiff's feelings, the defendant being ignorant of the intended use: *White v. Dresser*, 135 Mass. 150; 46 Am. Rep. 454.

STARK v. BARE.

[39 KANSAS, 100.]

ACTION FOR DAMAGES MAY BE MAINTAINED BY DEBTOR AGAINST CREDITOR FOR WRONGFULLY PREVENTING DEBTOR FROM OBTAINING BENEFIT OF EXEMPTION LAWS as to his personal earnings, by the creditor's making a pretended assignment of his claim, without consideration, for the purpose of evading the exemption laws of the state in which the creditor and debtor both resided, to a citizen of another state who brought action thereon in the latter state, and caused the debtor's wages, payable by a railroad company there, to be taken and appropriated by process of garnishment, as it was possible to do by the laws of such latter state.

ACTION for damages. The opinion states the case.

Frank Herald, for the plaintiff in error.

G. C. Clemens, for the defendant in error.

JOHNSTON, J. J. V. Bare brought an action in the superior court of Shawnee County, against N. D. Stark, to recover damages for the wrongful action of Stark in defeating him from obtaining the benefit of the exemption laws of Kansas, and in injuring the credit and standing of Bare with his employers. The allegations of the petition are, in substance, that the plaintiff and defendant are permanent residents of the city of Topeka, and that Bare is a married man, having a family depending upon him for support, and is engaged in the service of the Atchison, Topeka, and Santa Fé Railroad Company, which operates a railroad through the state of Kansas, and into Kansas City, Missouri, in which latter place the railroad company has an agent, and is subject to the process of garnishment and other processes issued from the justices of the peace and courts of Kansas City, Missouri; that under and by virtue of the laws of Missouri, when an action is commenced before a justice of the peace in the city of Kansas City, holding his office under the laws of Missouri, against an inhabitant and resident of Kansas, and in such action garnishment is issued to and served upon the railroad company, the

earnings of the employee of the company, being such Kansas defendant, are garnished and held, and such earnings are not exempt from appropriation in the action, and neither the exemption laws of Kansas nor Missouri have any application in such action; that on or about July 20, 1886, Stark claimed that Bare was owing him a small sum of money, but Bare claimed a set-off of an amount greater than Stark claimed, and that immediately Stark made a pretended sale and transfer of his claim, without consideration, to one John W. Leatherbury, a resident of Missouri, for the purpose of having Leatherbury bring an action against Bare before a justice of the peace of Kansas City and have garnishment process issued and served upon the railroad company, and thereby garnish and appropriate the personal earnings of Bare and apply them to the payment of Stark's alleged claim; that Bare is engaged at work for the railroad company in the city of Topeka, seventy miles distant from Kansas City, on monthly wages, and that his earnings are necessary for the maintenance of his family, and that the defendant, knowing these facts, and that he was unable to leave his employment to go to Kansas City to make a defense to the action on the pretended claim, colluded and conspired with Leatherbury to make the pretended transfer, so as to defeat Bare from all benefit of the exemption laws exempting to him his personal earnings; that an action was brought before a justice of the peace of Kansas City, in the name of Leatherbury as plaintiff, against Bare; that garnishment process was issued and served upon the railroad company, compelling it to answer concerning its indebtedness to Bare, and a judgment was rendered in favor of Leatherbury for the sum of \$50.70, including \$16 for costs, which amount the railroad company paid over as garnishee and was received by Leatherbury, who was acting collusively with Stark; that the personal earnings so appropriated were necessary for the maintenance of Bare's family, and were his personal earnings for his services rendered within four weeks next before the pretended transfer, and within three months prior to the rendition of the judgment; that all of these acts and things were done by Stark from malice toward the plaintiff, and with the deliberate purpose of defeating him of his defense and of his exemption, to injure his credit, and, by means of the annoyance of garnishment proceedings, to induce his discharge by the railroad company from its employment, and by reason of the action, he has been deprived of the benefit of his earn-

ings and exemption, is in danger of losing his employment, his credit in the community is injured, and his family are put in want by being deprived of the earnings which they sorely need. It is also averred that Stark well knew that he was indebted to Bare more than one hundred dollars over and above his alleged demand. Bare prayed judgment for damages to the extent of two thousand dollars. A demurrer to the petition was filed by Stark, the grounds of which were that there were two causes of action improperly joined, and that the petition does not state sufficient facts to constitute a cause of action. The demurrer was overruled by the court, and this ruling is complained of here.

The point that there is a misjoinder of causes of action because of the allegation that Stark owed the plaintiff more than one hundred dollars at the time of the alleged wrongdoing is not good. The pleader manifestly intended to state but one cause of action. The matter of the indebtedness is only one of the many facts set out in the petition to show the relations existing between the parties at the time Stark attempted to defeat Bare from availing himself of the benefits of the exemption laws. No recovery is sought upon that indebtedness in this action. The policy of our state is exceedingly liberal in providing protection for the families of indigent debtors. Among other exemptions, it is enacted that the personal earnings of a debtor for three months next preceding the issue of any process against him for the collection of a debt, and which earnings are necessary for the support of the debtor's family, are exempt from such process. This provision has been frequently sustained and enforced. We have gone further, and held that where a citizen of this state attempts, by a proceeding in attachment or garnishment in another state, to subject to the payment of his debt personal earnings of the debtor which, under our laws, are exempt, and thus prevent such debtor from availing himself of the benefit of the exemption laws of the state, an action by injunction restraining the wrongful action may be maintained by the debtor against such wrong-doer: *Zimmerman v. Franke*, 34 Kan. 650. In the present case, both parties are citizens of the state, and subject to its laws. According to the allegations of the petition, Stark brought his action in Missouri, at a place far distant from the residence of Bare, for the express purpose of evading the Kansas laws, and wrongfully appropriating the earnings of Bare to which he was not entitled. We

think it is a wrong which may not only be restrained by injunction, but that the citizen who proceeds and inflicts the wrong is liable to the debtor to the extent of the injury sustained. In Nebraska, where a somewhat similar statute exists exempting the personal earnings of the debtor who is the head of a family, a creditor instituted a proceeding in which he appropriated, by garnishment, the earnings of the debtor which were exempt from execution or garnishment process. The debtor subsequently brought suit to recover the amount so wrongfully appropriated, and the supreme court of that state sustained the action, holding that the creditor had procured property to be applied to the payment of his judgment to which he was not entitled, and that he must refund. In disposing of the case, the court remarked: "It is well settled that if exempt property is seized, and applied to the payment of a judgment, the owner may have his action against the wrong-doer, unless such exemption is waived by some act or omission of the debtor": *Albrecht v. Treitschke*, 17 Neb. 205. See also *Phillips v. Hunter*, 2 H. Black. 403; *Vail v. Knapp*, 49 Barb. 299; *Snook v. Snetzer*, 25 Ohio St. 516; *Haswell v. Parsons*, 15 Cal. 266; 76 Am. Dec. 480; *Phelps v. Goddard*, 1 Tyler, 60; 4 Am. Dec. 720. Within the principles of these cases, it must be held that the petition states a cause of action, and therefore the judgment of the superior court will be affirmed.

WHERE A RESIDENT OF IOWA TAKES PROPERTY THERE EXEMPT FROM EXECUTION TO ANOTHER STATE for a temporary purpose, a creditor of his who is also a resident of Iowa will be restrained by the courts of the latter state from enforcing against the property a judgment obtained by him in such other state: *Mumper v. Wilson*, 72 Iowa, 163; 2 Am. St. Rep. 238, and note 240-242, treating of the extraterritorial effect of exemption laws; see also *East Tennessee etc. R. R. Co. v. Kennedy*, 83 Ala. 462; 3 Am. St. Rep. 755. But where personal property in one state was sold there upon a credit, and afterwards removed to another state, it may be seized there in the vendee's possession, and condemned to sale, under sections 4398 and 4399, Mansfield's Digest, in an action brought by vendor to recover the purchase price, though the laws of the state in which the sale was made afforded the vendor no remedy against the specific property, and the debtor might have claimed it there as exempt: *Swanger v. Goodwin*, 49 Ark. 287.

FURNEAUX v. FIRST NATIONAL BANK OF WHITE-WATER.

[89 KANSAS, 144.]

JUDGMENT UPON ONE CAUSE OF ACTION, WHEN CONCLUSIVE UPON ANOTHER. — Judgment against defendant in an action upon one of several notes given by him in part payment of the purchase price of machinery is conclusive as to a defense set up and determined therein, so long as the judgment stands unreversed, in an action brought against him upon another of the notes by another party to whom such note had been transferred.

ACTION upon a promissory note. The opinion states the case.

W. D. Webb, for the plaintiff in error.

James Falloon, for the defendant in error.

CLOGSTON, C. This was an action on a promissory note, brought by the First National Bank of Whitewater, Wisconsin, against John Furneaux, upon a note executed by Furneaux to Esterly and Son, and by them indorsed and transferred to the plaintiff, defendant in error. The execution of the note was admitted by the defendant, and in answer he alleged that this note was given in part payment for a harvester and twine-binder purchased of Esterly and Son; that said harvester was the sole and only consideration for said note, and was purchased under a warranty given by said Esterly and Son, by which it was warranted to be of good material, and would, if properly handled, do good work; and in case of failure to do good work, defendant was to notify the agents through whom it was purchased of that fact, and upon the receipt of said note, they were to either repair and put said harvester in good working order, so that it would do good work, or if the said machine failed thereafter, then it was to be returned by defendant to the agents, and a new machine was to be furnished in its place, or the notes given in payment therefor were to be returned. Defendant alleged that the machine was of poor material, and would not perform good work, and was wholly worthless, and that he notified Esterly and Son and said agents of that fact, and they attempted to repair said machine, but it failed to do and perform as warranted, and that it was thereafter returned according to said contract; but that said Esterly and Son and said agents refused to surrender the notes or furnish a new machine; that by reason of said failure,

the consideration of the notes wholly failed. Defendant also alleged that plaintiff received said note from Esterly and Son after maturity, and with a full knowledge of all the facts. In reply, among other things, the plaintiff alleged that the note in controversy was one of a series of three notes executed by defendant to Esterly and Son for the purchase of a harvester and twine-binder, as alleged in defendant's answer; that when the first of these notes became due, it was not paid, and suit was brought thereon by Esterly and Son in the district court of Brown County, Kansas; that in said action defendant alleged and set out the same want of consideration, and the same warranty, and the same defect in the harvester and binder, and made identically the same defense as in this action, and plaintiff alleged that said former adjudication was a complete bar to the defense alleged and set out in this action. Thereupon, and upon agreement, the action was submitted to the court without a jury upon the question of *res judicata*, and in support of the reply, the files of the said former action were offered in evidence, being the petition, answer, and judgment, which showed that the same defense alleged and set out in this action was alleged and set out in defense of the action brought by Esterly and Son against the defendant upon the first note of the series of notes executed in payment of said harvester, and that said judgment was rendered in favor of Esterly and Son and against the defendant for the amount of said note. Upon the evidence, the court found that the former judgment was a complete bar to this action, and rendered judgment for the plaintiff for the amount of said note and interest.

The defendant now insists that this was error, for the reason that said action was not a bar; that to constitute a bar, the subject of the action must be the same as well as the parties, and as this was an action upon a different promissory note, and between different parties, therefore defendant was not barred from pleading the same defense. In this we think the defendant is mistaken. It is true that the plaintiff's answer does not show when the transfer of this note was made, whether before or after the former adjudication; but the defendant, in his answer, alleged that it was received by the plaintiff, or transferred by Esterly and Son to the plaintiff, after the maturity of the note. Taking the allegations of the defendant with the proofs, it must be held that this note was received by plaintiff from Esterly and Son after the former

adjudication, or at least after the note became due. The plaintiff, then, stood in the same relation to the defendant in this action as though the suit had been brought by Esterly and Son, and he had the right to make the same defense to the answer that they could have made. Where a party makes a defense to an action on a note that was given in part payment of the purchase price of machinery, and other notes were given as a part of the same transaction and for the same consideration, a defense to one of these notes must be conclusive as to all. As long as the judgment stands unreversed, a party cannot be heard again to urge that defense. He has had his day in court, has had his grievances passed upon by a tribunal, and such decision is final: *Foster v. Konkright*, 70 Ind. 123; *Guest v. City of Brooklyn*, 79 N. Y. 624; *Geiser Machine Co. v. Farmer*, 27 Minn. 428; *Danziger v. Williams*, 91 Pa. St. 234; *Hanna v. Read*, 102 Ill. 596; 40 Am. Rep. 608; *Whitaker v. Hawley*, 30 Kan. 317, 326, 327; *Freeman on Judgments*, sec. 249.

It is recommended that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

WHEN JUDGMENT MAY BE PLEADED AS RES JUDICATA: *Lea v. Lea*, 99 Mass. 493; 96 Am. Dec. 775, note; *Harmon v. Auditor etc.*, 123 Ill. 122; 5 Am. St. Rep. 502; *State v. Bechdel*, 37 Minn. 360; 5 Am. St. Rep. 854. In an action upon a promissory note, where the defense is made that defendant executed and delivered to plaintiff a deed to lands, which was accepted by plaintiff in full payment of the note sued on and other notes due from defendant to plaintiff, the record of a former action by the same plaintiff against the same defendant, on one of the other notes, in which the same defense was made, and where it was decided that the deed was never delivered and accepted as alleged, is conclusive against the defendant: *Young v. Brehe*, 19 Nev. 379; 3 Am. St. Rep. 892.

WHERE NOTES ARE GIVEN FOR INSTALLMENTS, under such circumstances that a defense valid against one is necessarily valid against the others, a judgment for the defendant in an action on one is a bar to actions on the others: *Cleveland v. Creviston*, 93 Ind. 31; 47 Am. Rep. 367. But where a partial defense is pleaded to one of a series of notes, a judgment for less than the face of the note has no effect as to the other notes: *Felton v. Smith*, 88 Ind. 149; 45 Am. Rep. 454.

GODFREY v. BLACK.

[99 KANSAS, 193.]

LEASED PREMISES, INJUNCTION AGAINST USE OF IN VIOLATION OF TERMS OF LEASE. — Equity will interfere by injunction, on behalf of the lessor, to prevent the lessee and sublessee from continuing an unauthorized use of the leased premises, notwithstanding the lessor may have a right of re-entry or an action for damages, where a building, designed and constructed for use as a hotel, is leased by the owner for that purpose, with a covenant that the lessee shall not sublet the premises without the consent of the lessor, and the lessee, without the consent of the lessor, sublets a portion of the hotel office, to be used for carrying on a real estate and brokerage business, which detracts from the reputation and popularity of the house, and impairs its value as a hotel.

PETITION for an injunction. The petitioner, Robert Black, who is the owner of certain premises designed and constructed for use as a first-class hotel, leased the same to Roberts Brothers, to be used for that purpose. The lease provided that Roberts Brothers might carry on any business in the building incident to the hotel business; but it was expressly stipulated that they should not lease or underlet, or permit any persons to occupy, the premises, without the consent of the lessor in writing having been first obtained. In violation of the terms of the lease, Roberts Brothers sublet a portion of the hotel office to E. C. Godfrey, to be used by Godfrey in carrying on a real estate and brokerage business, which was alleged and shown in evidence to detract from the reputation and popularity of the house, and to impair its value as a hotel. Black asked for an injunction prohibiting Roberts Brothers from leasing or subletting the hotel building and premises, or any part thereof, to Godfrey for a real estate office, and restraining Godfrey and his agents and employees from occupying the office of the hotel, or any part thereof, as a real estate office. A temporary injunction was granted against Godfrey, enjoining him and his agents and employees, as prayed for, during the pendency of this action. Godfrey now brings error.

Sankey and Campbell, for the plaintiff in error.

Campbell and Dyer, for the defendant in error.

JOHNSTON, J. We see no reason to disturb the order granting the temporary injunction. The building in question was constructed for use as a first-class hotel, was rented for that purpose, and it was expressly specified in the lease that the lessee should not sublet the premises, or permit any one else

to occupy the same without the consent in writing of the lessor having been first obtained. In direct violation of the terms of the lease, Roberts Brothers sublet a portion of the hotel office, to be used by Godfrey in carrying on a business inconsistent with the hotel business, and which the testimony says detracts from the reputation and popularity of the house. They had no right to sublet or permit the hotel to be used by Godfrey, and he acquired no right by the agreement made with them.

It is claimed that injunction is not the proper remedy in such case, and actions to recover possession and to recover damages for trespass, where the defendants could have the issues submitted to a jury, are suggested. The lessor is not confined to these remedies, nor are they adequate. He has a right to insist that the covenants of the lease shall be observed, and that the premises shall be used only for the purposes agreed upon. It does not appear that the lease was to terminate upon a breach of the covenants; but even if the lessor had a right to re-enter, that would not preclude him from obtaining equitable relief to prevent a forbidden use of the premises. Presumably, the continuance of the lease for the full term is beneficial to the lessor, and he is entitled to a performance in accordance with the contract made. Upon this ground the mere re-entry is held to be an inadequate remedy, as it does not leave the lessor in as good a position as the enforcement of performance by the tenant would leave him in. *Bodwell v. Crawford*, 26 Kan. 292, 40 Am. Rep. 306, is cited as an authority against maintaining the action. The two cases are very dissimilar. There, no contractual relation existed between the parties, and the possession of the premises by the defendant was wholly unauthorized. In giving the opinion in that case, the writer carefully distinguished it from those like the present one, holding that injunction to restrain parties from putting leased property to a use not authorized by the lease could be maintained. In speaking of a re-entry by the landlord, it was there remarked: "True, he may perhaps declare the lease forfeited, and recover the property, but he may not desire to do this; he may not be able to lease for the same rent or to an equally responsible tenant, and the lessee ought not to be permitted to compel the lessor either to take back the property or tolerate a forbidden use": *Steers v. Kranz*, 32 Minn. 313; *High on Injunctions*, secs. 1138, 1144. Neither is the right of the lessor to bring an action to recover

compensatory damages for the trespass a sufficient ground for withholding the remedy of injunction. Equitable relief may be properly extended in some cases against trespass. An action at law against the trespasser here would not be an adequate remedy. A new cause of action would arise every day for the constantly recurring grievance which would lead to a multiplicity of suits, and the necessity of preventing these is an exception which warrants the exercise of the equitable jurisdiction of the court. Besides, the lessor has a right to insist upon his property being used in the manner fixed by agreement in the lease; and the testimony tends to show that the carrying on of the real estate business in the office of the hotel will deteriorate its value, and seriously injure the hotel; and in such cases equity will interfere to restrain the continuance of the injury: *High on Injunctions*, sec. 1142; *Steward v. Winters*, 4 Sand. Ch. 587; *Macher v. Foundling Hospital*, 1 Ves. & B. 188; *Stees v. Kranz*, 32 Minn. 313.

Under the pleadings and the proofs, the temporary injunction was properly allowed, and the order granting it will be affirmed.

INJUNCTION BY THE OWNER OF LAND to restrain the occupant's use of the premises: See *Bodwell v. Crawford*, 26 Kan. 292; 40 Am. Rep. 306; compare *Detroit Base-ball Club v. Deppert*, 61 Mich. 63; 1 Am. St. Rep. 566.

WHEN INJUNCTION LIES against trespass or waste: *Shipley v. Ritter*, 7 Md. 408; 61 Am. Dec. 371, and note 375; *Pensacola etc. R. R. Co. v. Spratt*, 12 Fla. 26; 91 Am. Dec. 747; *Ryan v. Brown*, 18 Mich. 196; 100 Am. Dec. 154, and note 162. Before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable in its nature; it is not sufficient simply to allege that fact, but it must be shown how and why it will be so: *M. Foundry etc. v. Ryall*, 75 Cal. 601.

WHITSON v. GRIFFIS.

[39 KANSAS, 211.]

CHATTEL MORTGAGE IS NOT VOID BECAUSE MORTGAGOR IS TO RECEIVE SOME BENEFIT therefrom, if the provisions for such benefit are made in good faith, and not for the purpose of hindering, delaying, or defrauding creditors.

CHATTEL MORTGAGE IS NOT TO BE CONSIDERED VOID AS TO MORTGAGOR'S CREDITORS UNLESS GOOD FAITH OF TRANSACTION IS ESTABLISHED BY STRICT PROOF, from the mere fact that the mortgager is a step-daughter of the mortgagee, although that is a circumstance to be taken into consideration by the jury.

CHATTEL MORTGAGE ON STOCK OF GOODS IS NOT VOID, AS MATTER OF LAW, AS TO CREDITORS OF MORTGAGOR, but the question of good faith should be

submitted to the jury, where the mortgage contains a provision that the mortgagor shall remain in possession of the property, and sell the same in the course of trade, account for the proceeds, and receive out of the same the expenses of operating the business, and the means of subsistence of his family.

ACTION by C. C. Whitson against J. W. Griffis, as sheriff, to recover possession of a stock of goods and fixtures. The plaintiff claimed to be entitled to the same by virtue of a mortgage executed thereon by his step-daughter, Mrs. M. E. Breese, to secure the payment of a promissory note of nine hundred dollars. The defendant levied upon the property, by virtue of an order of attachment, as the property of Mrs. Breese. The mortgage contained a provision to the effect "that the said party of the first part, M. E. Breese, shall remain in possession of the property hereby conveyed, and may sell and dispose of the same, or any part thereof, upon the following conditions, to wit: That she shall keep an account of all sales made by her each day, in a book kept for that purpose, and that prior to the close of banking hours in each day shall deposit in the Cottonwood Falls or Chase County National Bank, to the order of the second party, the proceeds of all sales made up to the time of deposit, less such amounts of necessary change as may have to be kept on hand for the purpose of the trade after the hours of deposit; the amounts so retained each day shall be shown by a cash-book; the first party shall have a right to obtain from the proceeds of such sales aforesaid the necessary expenses attending the selling and care of said property, including store rent, fire, lights, fuel, clerk hire, and also reasonable living expenses of said party of the first part and her family, while she devotes her time to the business of selling and disposing of said property for the purpose of paying said indebtedness. And for the purpose last mentioned as aforesaid, said party of the first part shall have the right to draw upon the funds arising from such sales, subject to the approval or the second party, and such draft or order shall state the purpose for which it is drawn, upon its face; that whenever it is necessary to purchase any articles or staple goods, from time to time, in order to sell the other goods, a check or order may be drawn with the consent of the second party to pay for such goods; when purchased, shall be kept separate from the other goods, and the proceeds from the sale of these goods to be deposited to the credit of said account to the amount of the sum drawn to pay for the same." There

was a verdict and judgment for the defendant, and the plaintiff brings error. Further facts appear in the opinion.

Madden Brothers, and F. P. Cochran, for the plaintiff in error.

Thomas O. Kelley, and Smith and Solomon, for the defendant in error.

CLOGSTON, C. This was an action in replevin, to recover the possession of a stock of goods and fixtures claimed by the plaintiff by virtue of a chattel mortgage executed by his step-daughter, one M. E. Breese, to secure an indebtedness due from her of nine hundred dollars. The defendant levied upon said goods, by virtue of an order of attachment, as the property of Mrs. Breese. The sole question in issue was as to the validity of this mortgage by which plaintiff claimed his right of possession. Plaintiff complains of the instructions of the court to the jury, and the refusal to instruct as requested by him. The court, among other things, instructed the jury as follows:—

“7. But, on the other hand, I instruct you that if the mortgage in question was accompanied by an understanding or agreement that the same was wholly or in part for the benefit of said M. E. Breese, by placing her property out of the reach of creditors, then such mortgage was void as against the plaintiff and attaching creditors, notwithstanding the fact that the plaintiff may have been an actual creditor of said M. E. Breese; and in such case, plaintiff cannot recover.”

“12. You are further instructed, that if you find, from the evidence, that, at the time the mortgage in question was executed and delivered, C. C. Whitson was the step-father of the said M. E. Breese, and that they were residing together in the same house, and had so resided together for a long time prior thereto, and were, at said time, members of the same family, then these facts may be taken into consideration in determining the question of good faith; for where parties are so related, they are, in law, held to a stricter proof and accountability, as to good faith toward creditors, than mere creditors.”

These instructions were objected to; the objection was overruled by the court, and excepted to by plaintiff. In addition to these instructions, the plaintiff asked the court to give the following instruction: “Where a chattel mortgage is given on a stock of goods with a stipulation for possession thereof by

the mortgagor, and by agreement, in or outside of the mortgage, the mortgagor is permitted to continue disposing of the goods in the ordinary course of business, and to use a portion of said stock, or the proceeds thereof, for his support and that of his family, and pay out of such stock or proceeds rent, fuel, clerk hire, lights, paying the remainder over in discharge of the mortgage debt, the transaction will not be rendered fraudulent and void as to creditors, but will be upheld as valid, if entered into and carried out in good faith."

This instruction the court refused to give; which ruling was excepted to by plaintiff. We think the court erred in giving the two instructions above quoted, and in refusing to give the instruction asked by the plaintiff. Instruction No. 7, given by the court, rendered it impossible for the jury to return a verdict for the plaintiff, no matter how honest or how much good faith there was in the transaction between plaintiff and Breese. The court, by that instruction, said that if it was understood or agreed between these parties that the transaction was for the benefit, in whole or in part, of Mrs. Breese, by placing her property out of the reach of her creditors, then that the mortgage was void. If this transaction was just as plaintiff claimed it to be, and the mortgage was given in good faith and without any fraudulent intent, yet it would have the effect which the court said would render the mortgage void, if it was partly for her benefit. The mortgage also gave her the right to use a part of the proceeds arising from the sale of the goods; it gave her the right to sell them, and to receive compensation for so doing. These would all be benefits resulting to Mrs. Breese; and no matter how much good faith there was in the transaction, still, under this instruction, the jury was obliged to return a verdict for the defendant: *Howard v. Rohlfing*, 36 Kan. 357. To render a mortgage void by reason of some benefit resulting to the mortgagor from the giving of the mortgage, such benefit must have been given for the purpose of hindering, delaying, or defrauding creditors: *Frankhouser v. Ellett*, 22 Id. 127; 31 Am. Rep. 171.

Instruction No. 12, given by the court, we think was calculated to mislead the jury. The latter part of the instruction says: "They are, in law, held to a stricter proof and accountability, as to good faith toward creditors, than mere creditors." The jury might, and perhaps did, understand by this instruction that the bare fact that the relationship of step-father and step-daughter existed, and that they were living together as a

part of one family, was a circumstance that would render this transaction fraudulent, unless the plaintiff, by strict proof, established the good faith of the transaction.

Where a chattel mortgage is given containing a provision, as in this mortgage, that the mortgagor might retain possession and sell the property in the course of trade, and account for the proceeds, and receive out of such proceeds the expenses of operating the business, together with compensation and the means of subsistence of the family of the mortgagor during the time the business was being run, it has been upheld and sustained by this court: See *Frankhouser v. Ellett*, 22 Kan. 127; *Howard v. Rohlfing*, 36 Id. 357; *Arn v. Hoersemann*, 26 Id. 413; *Randall v. Shaw*, 28 Id. 419; *Leser v. Glaser*, 32 Id. 546. This transaction was being questioned, and the defendant had a right to question the good faith of the parties in making this transaction, and if it was found that this condition was put in the mortgage for the purpose of hindering and delaying the collection of a debt, then of course the mortgage would be void; but the court ought to have submitted the question to the jury, and they ought to have been informed that where such conditions and stipulations are contained in a mortgage, and placed there in good faith, that it would not be for that reason void. Such an instruction, or one embodying the principle therein contained, ought to have been given to the jury.

It is therefore recommended that the judgment of the court below be reversed.

By the COURT. It is so ordered.

CHATTEL MORTGAGE, WITH POWER TO SELL and replace the goods, construction and validity of: *Roundy v. Converse*, 71 Wis. 524; 5 Am. St. Rep. 240, and note 242.

AN AGREEMENT BETWEEN THE PARTIES TO A CHATTEL MORTGAGE THAT THE MORTGAGOR shall continue in possession, and sell the mortgaged property from time to time, paying over the proceeds to the mortgagee, is not unlawful or fraudulent *per se*: *Conkling v. Shelley*, 28 N. Y. 360; 84 Am. Dec. 348; but the question of fraud should be submitted to the jury: *Googins v. Gilmore*, 47 Me. 9; 74 Am. Dec. 472; *Barnet v. Fergus*, 51 Ill. 352; 99 Am. Dec. 547.

CONVEYANCE — PRESUMPTION OF FRAUD FROM RELATIONSHIP OF PARTIES: See note to *Drigg v. Norwood*, *ante*, p. 83.

BOYLAN v. WARREN.

[89 KANSAS, 301.]

PUBLIC RECORDS, WHO HAS RIGHT TO EXAMINE AND MAKE ABSTRACTS OF.

— Any person who has a present and existing interest in information to be obtained from the public records in any county office has a right to make an examination of such records to the extent of his interest, and to make copies, abstracts, extracts, or memoranda therefrom, under section 172 of the Kansas Compiled Laws of 1885, which provides, with respect to county officers, that "all books and papers required to be in their offices shall be open for the examination of any person"; and he may enforce such right by *mandamus*.

MANDAMUS. The opinion states the facts.

Hutchings and Keplinger, for the plaintiffs in error.

J. O. Fife, J. A. Hale, and Scroggs and Gibson, for the defendant in error.

VALENTINE, J. Three cases involving kindred questions have been submitted to this court upon the same argument and the same briefs. The first is an action of *mandamus*, commenced originally in the district court of Wyandotte County, on February 14, 1888, by W. S. Boylan against John Warren, to compel the defendant, as clerk of the district court of that county, to permit the plaintiff to examine the records in the clerk's office for the purpose of ascertaining whether there were any judgment liens or mechanics' liens upon certain lands in that county belonging to M. S. Twist, and to make an abstract of the title to such lands for Twist. The plaintiff also alleged that he was engaged in the business of furnishing abstracts of titles to real estate, and that he was specially employed in this case by said Twist. The case was heard before the court without a jury, and the court refused the writ of *mandamus*, and rendered judgment in favor of the defendant and against the plaintiff; and the plaintiff, as plaintiff in error, has brought the case to this court for review.

The next case was commenced originally in this court after the foregoing case was disposed of in the district court, and on February 28, 1888. It is an application by Boylan for a writ of *mandamus* against Warren to compel him to permit the plaintiff, as the employee of persons generally who may be specially interested in certain lands in said county to examine the judgment docket and the mechanics' lien book in his office, and to make copies or memoranda from such books for the above-named persons; and in addition thereto he

alleges a special employment by the Kansas City, Wyandotte, and Northwestern Railway Company for such purpose, which company, he alleges, is interested in certain lands as owner, and in other lands as contemplated purchaser.

The next case, which was commenced after the foregoing case, to wit, on March 6, 1888, is an application in this court by the Kansas City, Wyandotte, and Northwestern Railway Company for a writ of *mandamus* to compel Warren to permit the railway company, through its agents, to examine the records in the clerk's office, and to make copies and memoranda thereof in cases where it may be specially interested; and it alleges that W. S. Boylan is its agent for that purpose, and that it wishes to ascertain the title to particular lands which it has purchased and which it is expecting to purchase.

It is admitted that Boylan is a professional abstractor of titles, and that his business involves the examination of the various public records of the county, and this not only for the purpose of furnishing abstracts of titles to lands to particular persons who have some special and pecuniary interest therein who may employ him to do so on particular occasions, but also for the purpose of procuring *data* from which he may make abstracts of titles for whoever may employ him to do so in the future. It is also admitted that Warren is the clerk of the district clerk of Wyandotte County, and that he refuses to permit Boylan to examine either the judgment docket or the mechanics' lien book for any such purpose, or to make copies or abstracts or memoranda therefrom, or of anything contained therein. The three cases now presented to us, we think, raise all the questions which the plaintiffs might desire to raise as between themselves and the clerk, and all questions which any person having occasion to examine the public records in the office of the clerk of the district court for any purpose, whether as principal or agent, or as attorney or client, might desire to raise as between himself and the clerk. In this state, the clerk of the district court is required by statute to give a bond "conditioned that he will truly and faithfully pay over to the proper person or persons all moneys which may be by him received in his official capacity, and faithfully discharge the duties of his said office": Comp. Laws of 1885, c. 25, sec. 147. Section 148 of the same chapter reads as follows:—

"Sec. 148. The clerks of the district courts shall do and perform all duties that may be required of them by law or the rules and practice of the courts, and shall safely keep and

preserve all papers, process, pleadings, and awards that may be filed or by law placed in their respective offices."

See also sections 630 to 632 of the Civil Code, relating to mechanics' liens, and also sections 703 to 716 of the Civil Code, relating to the duties of clerks of the district court. Section 172, article 15, chapter 25, of the Compiled Laws of 1885, reads as follows:—

"Sec. 172. Every county officer shall keep his office at the seat of justice of his county, and in the office provided by the county, if any such has been provided; and if there be none established, then at such place as shall be fixed by special provisions of law; or if there be no such provisions, then at such place as the board of county commissioners shall direct, and they shall keep the same open during the usual business hours of each day (Sundays excepted); and all books and papers required to be in their offices shall be open for the examination of any person; and if any of said officers shall neglect to comply with the provisions of this section, he shall forfeit, for each day he so neglects, the sum of five dollars; provided, that in counties of less than five thousand inhabitants, the probate judge shall not be compelled to keep his office open at the county seat, except at the regular term, except the county commissioners shall so order."

Our attention is particularly called to that portion of the foregoing section which reads as follows: "All books and papers required to be in their offices shall be open for the examination of any person." It is claimed by counsel for the defendant, Warren, that this provision of the statutes does not mean what it says; that the clerk of the district court is not required to keep "all books and papers," or indeed, any books or papers, "open for the examination of any person," and they cite the decision of this court made in the case of *Cormack v. Wolcott*, 37 Kan. 391, as authority for such claim. We think they misinterpret that decision. All that was decided in that case is as follows: "The register of deeds will not be compelled by *mandamus* to permit any person to make copies of the entire records in his office for the purpose of making a set of abstract books for private use or speculation; and no such right is given by section 211 [172], chapter 25, Compiled Laws of 1885."

We think that case was decided correctly, but it does not apply to the three cases now under consideration. We also think that much more might be decided in line with that

decision and still not reach the questions involved in the present cases. For instance, it might be decided or admitted that in all cases where a person wishes to examine the records of a public office, whatever that office may be, whether the register's office, the district clerk's office, or any other office, unless he has a present and existing interest of a pecuniary character in the information to be obtained from such records, he has no right of action of any kind,—*mandamus*, injunction, for damages, or other action,—although the officer in charge may utterly refuse to let him even see the records. And it may also be admitted that no person has any absolute right to examine the records except during office hours, and during a time when the records are not in the rightful or proper use of any other person. The refusal of the officer in charge to permit a person to gratify a mere idle curiosity, or to examine the records for the mere purpose of taking copies or memoranda thereof for some supposed possible use in the future, or to examine the records when they are otherwise rightfully and properly in use by some other person, cannot constitute a basis for any kind of action. Some present and existing right of a person must be infringed to the injury of such person before any cause of action of any kind can accrue in his favor; and upon this principle the case of *Cormack v. Wolcott*, *supra*, was really decided. In the opinion of this court, the statute last above quoted means just what it says. "All books and papers" required to be kept in any public county office must be kept "open for the examination of any person," whoever that person may be, provided he has some or any present and existing interest to be subserved by the examination; and it can make no difference whether such interest be great or small, or whether he is interested as a principal or as an agent, or as an attorney or as a client: he has a right to examine such books and papers to the extent of his interest.

These views we think are sustained by the authorities. The authorities relied upon as being in opposition to these views are the following: *Cormack v. Wolcott*, *supra*; *Bean v. People*, 7 Col. 200; *Webber v. Townley*, 43 Mich. 534; 38 Am. Rep. 213; *Match Company v. Powers*, 51 Mich. 145; *Buck v. Collins*, 51 Ga. 391; 21 Am. Rep. 236; *Brewer v. Watson*, 71 Ala. 299; 46 Am. Rep. 318; *Phelan v. State*, 76 Ala. 49; *Randolph v. State*, 82 Id. 527; 60 Am. Rep. 761. Although these authorities just cited are generally against an inspection or examination of the records under the particular facts of each case, yet they do not

conflict with the views we have expressed, and do not support the contention of the defendant. The first case cited is a fair sample of the others. Indeed, we think the *dicta* of the most of these authorities support our views, and are against the contention of the defendant. For instance, in the case last cited the following language is used by the supreme court of Alabama:—

“We must not, however, be understood as intending to abridge the right conferred by statute of ‘free examination,’ by all persons having an interest, of the records of the probate judge’s office. Nor will we confine this right to a mere right to inspect. He may take memoranda or copies, if he will, and to this end may employ an agent or attorney. The limitation is, that he must not obstruct the officers in charge in the performance of their official duties, by withholding the records from them when needed for the performance of an official function. Nor is this right of examination confined to persons claiming title, or having a present pecuniary interest in the subject-matter. It will embrace all persons interested, presently or prospectively, in the chain of title or nature of encumbrance proposed to be investigated. The right of free examination is the rule; and the inhibition of such privilege, when the purpose is speculative, or from idle curiosity, is the exception.”

On the other side there are cases which seem to be very nearly in point in favor of the plaintiffs in the cases now under consideration: *State v. Rachac*, 37 Minn. 372; *Hanson v. Eichstædt*, 69 Wis. 538; *In re McLean*, 8 Fed. Rep. 813 (U. S. Cir. Ct. So. Dist. Ohio); *People v. Richards*, 99 N. Y. 620; *People v. Reilly*, 38 Hun, 429; *People v. Cornell*, 47 Barb. 329; *Hawes v. White*, 66 Me. 305; *O’Hara v. King*, 52 Ill. 303. It makes no difference, however, what has been decided in other states with respect to the questions which we now have under consideration, for the statute in this state governs and controls. Its language is plain, and needs no interpretation. All may understand it who will read it. Under its provisions, “all books and papers,” without any exception, must be kept open for inspection and examination, and “any person,” without any exception, has the right to examine and inspect them. There may be, and indeed are, exceptions arising from the nature of the things to be performed and from conflicting rights and interests, but there are none within the terms of the statute. And further, *mandamus* will lie to enforce a

right in any proper case at the instance of any "party beneficially interested": Civ. Code, sec. 689. An agent, as well as a principal, may often, though not always, be a "party beneficially interested." And where an agent has a beneficial interest in a thing, if such an interest is enforceable at all by *mandamus*, he may enforce his interest by *mandamus*. From anything appearing in the cases now under consideration, neither of the plaintiffs has any other plain and adequate remedy. Also, the last two cases brought were properly brought in this court. The defendant refers, however, to the case of *State v. Breese*, 15 Kan. 123; but that case has no application to these cases. One of the present cases was commenced in the district court, and sufficient reasons are shown for commencing the other two in this court. Before closing this opinion it would perhaps be proper to state that "any person," even as abstractor of titles, who may have sufficient interest in the information to be obtained from the public county records to entitle him to an examination of the same, may, if he chooses, make copies, abstracts, extracts, or memoranda therefrom. There is no statute and no good reason against it.

In the first case the judgment of the court below will be reversed; in the other two cases peremptory writs of *mandamus* will be allowed.

RIGHT OF PRIVATE PERSON TO EXAMINE PUBLIC RECORDS and to make abstracts therefrom: *Randolph v. State*, 82 Ala. 527; 60 Am. Rep. 761, and note 764-768, where the cases are collected and reviewed.

BOOK OF ACCOUNTS OF TAX COLLECTORS KEPT BY THE STATE AUDITOR IS A PUBLIC RECORD, and an attorney at law employed by a tax collector to represent him on a settlement of his accounts has a right to inspect the accounts of his client as entered therein, upon showing evidence of his employment: *Brewer v. Watson*, 71 Ala. 299; 46 Am. Rep. 318.

ABSTRACTS OF TITLE — REGISTER OF DEEDS — MANDAMUS. — The register of deeds will not be compelled by *mandamus* to permit any person to make copies of the entire records in his office, for the purpose of making a set of abstract books for private use or speculation; and no such right is given by section 211, chapter 25, Compiled Laws of 1885: *Cormack v. Wolcott*, 37 Kan. 391.

CONTINENTAL INSURANCE COMPANY v. PEARCE. •

[39 KANSAS, 396.]

ANSWER, AVERMENTS OF, WHEN DEEMED DENIED. — Allegations of agency and authority pleaded as new matter in a reply are to be deemed to be controverted by defendant without the filing of any pleading or affidavit denying the same, under section 86 of the Kansas code, which does not provide for any pleading to the reply, except a demurrer, and section 128, which provides that "the allegation of new matter in the reply shall be deemed to be controverted by the adverse party, as upon direct denial or avoidance, as the case may require," notwithstanding section 108, which provides that "in all actions, allegations of . . . any appointment or authority shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

INSURANCE — STIPULATIONS SEEKING TO MAKE AGENT OF INSURER THE AGENT OF THE ASSURED. — An agent who solicits insurance for an insurance company and fills in blanks in a printed form of application is the agent of the company, and not of the insured, in the taking of the application, although there is a stipulation on the face of the application that the statement is the statement of the insured, and the questions are answered by the insured or by his authority; and if the agent writes down false answers without the knowledge of the insured, after he has been truthfully informed by the insured of the condition of the premises, and had personally inspected the same, the insured should not suffer for his misrepresentations, notwithstanding the insured signed the application, and the policy made the representations in the application warranties.

INSURANCE COMPANY IS ESTOPPED FROM DENYING TRUTH OF STATEMENTS FALSELY FILLED IN BLANKS IN PRINTED FORM OF APPLICATION BY ITS AGENT without the knowledge of the insured, although the insured signed the application, the agent having been truthfully informed by the insured of the condition of the premises, and having personally inspected the same, where the company receives the premium, and issues a policy, and a loss occurs.

STATEMENT OF AGENT OF INSURANCE COMPANY UPON BACK OF BLANK APPLICATION IN ANSWER TO CERTAIN PRINTED QUESTIONS TO SUCH AGENT concerning the property insured are admissible in evidence to show that the agent knew the condition of the property, and filled in the application with a view of obtaining the premium rather than of correctly transcribing the answers of the insured.

POLICY IS NOT AVOIDED BY FALSE STATEMENTS IN APPLICATION, under a provision that the statements contained in the application are warranties and if any of them are false the policy shall be void, when the false statements in the application are made by the agent of the insurance company, without the knowledge of and without any fraud or attempt to deceive or misrepresent on the part of the insured.

ACTION by Amos E. Pearce against the Continental Insurance Company of New York upon a policy of insurance. The plaintiff had a verdict and judgment upon the first count in his complaint, he having dismissed the other counts, and the defendant now brings error.

Kellogg and Sedgwick, for the plaintiff in error.

• *Buck and Feighan*, for the defendant in error.

HOLT, C. Defendant in error, as plaintiff, commenced his action in the Lyon district court to recover the sum of \$1,484.75. His petition contained three counts, but we have only the first one under consideration. In it he averred that defendant had issued to him a policy insuring him against loss by fire on a dwelling-house, its contents, and a barn, and that they were accidentally destroyed by fire. The defendant in its answer alleged that the policy of insurance was issued upon plaintiff's application, which was false in its statements and representations, and which he made for the purpose of deceiving and defrauding defendant. The plaintiff, in his reply, says that the application was written out by the agent of defendant, who had previously made an accurate and careful examination of the premises, knew how the house was built, and had expressed himself satisfied with its condition and surroundings; and he also further set forth that the agent had full authority to waive any conditions in the application. There was a trial by a jury, verdict for plaintiff, and judgment thereon. The defendant is plaintiff in error.

The first question that confronts us is, whether the allegation in plaintiff's reply of agency and authority of the party taking the application should be taken as true. Section 108 of the Civil Code reads as follows: "In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, of any appointment or authority, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

The plaintiff contends that under this section the allegations of the reply should be treated as fully proven. If we should accede to this proposition, it alone would determine this case, for the averments of the reply are a complete defense to the answer of defendant. If section 108 was the only one to consider in this matter, we would be compelled to hold that the averments of authority and agency are true, and that the party taking the application had full power to make and modify it as completely as though the defendant itself by its principal officers was present. We are at a loss, however, to know how, under our code, the reply could be formally denied; for section 86 provides: "The only pleadings allowed are:

1. The petition by the plaintiff; 2. The answer or demurrer by the defendant; 3. The demurrer or reply by the plaintiff; 4. The demurrer by the defendant to the reply of the plaintiff."

This section makes it plain that no pleading is allowed to a reply, save only the demurrer of defendant thereto. It was suggested to us that an affidavit denying the truth of the allegations might be filed. But that would not be permissible; for an affidavit is not a pleading, nor could the explicit provisions of the statute be thus evaded by filing one, and asking that it should have the force of a pleading. But section 128 of the code provides: "The allegation of new matter in the reply shall be deemed to be controverted by the adverse party as upon direct denial or avoidance, as the case may require."

Probably the primary application of the clause, "as the case may require," may have reference to the distinction between a general denial and a plea of confession and avoidance; but we think it will not violate the spirit of the section to apply it, without reservation, to averments of authority and agency in a reply. No pleading would put in issue like allegations, unless verified by the oath of the party, his agent or attorney, and the statute provides that all allegations of the reply shall be deemed controverted by the adverse party, without the filing of any pleading.

The plaintiff makes this contention: that all allegations in a reply, except those concerning matters referred to in section 108, should be considered as denied without any pleading, but those matters named in said section must be denied by a verified one. We cannot so construe the language of that portion of section 128 we have quoted, especially when there is no provision of the code authorizing such a pleading. We can readily see that this construction might not always be satisfactory, and in some instances would necessitate the production of witnesses and testimony that section 108 was intended to obviate. The express provisions of the statute limiting the number of pleadings must govern, although good reasons may exist for a different rule. We think, therefore, it devolved upon the plaintiff to prove by evidence that the party taking the application had authority from the company. The testimony supporting such allegation will be considered hereafter.

The facts concerning the application are these: Plaintiff was building a house a short distance from the city of Em-

poria, and the agent of defendant, wishing to insure him, visited the place two or three times in his absence, and finally met him at a bank in Emporia, where the application was made. Some of the statements in the application were false. The special questions and answers that are important, and which we shall especially consider, are: "Chimneys,—material of same? Brick. Condition? Good. On what do they rest? Brackets. Stove-pipes,—do they pass through roof or floor? No. How near wood? Twelve inches. How secured? By safe of zinc in flue, held by wire." The facts were that there was but one chimney; the kitchen stove was not supplied with a flue, but from it was a stove-pipe running up through the roof, and which was not more than three or four inches from the wood, and was secured by a safe of zinc, held by wires. When the application was taken the agent wrote down all of the answers, and read over a part of them to plaintiff, and he signed them without knowing these answers were in the application. His testimony concerning the matter was to the effect that he told the agent taking the application about the stove-pipe; that he had rather not insure then, but wait until his house was finished; and that his preference was the Freeport, Illinois, company. The agent made some objection to the condition of the stove-pipe in the kitchen, and asked plaintiff to build a flue there; but he told him it was out of the question, that he never would build it, that he had always been bothered with flues to his kitchen stove. The agent then said he would a little rather have it built; but plaintiff told him if he could not insure him without the flue, he could not insure him at all. Upon the face of the application, just above the signature of the plaintiff, was the following printed stipulation: "The foregoing is my own statement, and the questions are answered by me or by my authority, and will be assumed as my act, and the statements are warranted to be a correct description of the risk, and also a correct valuation and description of the property named, and of all encumbrances."

Upon the back of the application is a diagram, and under the head of "Questions to Solicitors" are the following: "Did you survey the risk personally? Yes. Do you fully recommend the risk? Yes.—J. A. Beals." In the body of the policy is the following stipulation: "This indemnity contract is based upon the representations contained in the application, of even number herewith, and which the assured has

signed, and permitted to be submitted to this company, and which is made a warranty and a part hereof; and it is stipulated and agreed that if any false statements are made in said application, . . . this policy shall be null and void."

In taking this application for insurance, was J. A. Beals the agent of plaintiff, or of defendant? It is claimed that, by reason of the stipulation on its face, which provided that all statements, answers, and descriptions were the acts of the plaintiff, whatever part Beals may have taken in making and filling it out was as his agent. It must be conceded that plaintiff did not seek Beals for this work; did not even ask him to do it, and paid him nothing therefor; did not even suspect that at that time he was his agent, but did believe that he was an insurance agent, looking after the interests of the company whose advantages he was advocating to plaintiff. He was canvassing for business for the defendant; had made several trips to plaintiff's house, before he saw him, to insure it, and, against plaintiff's preference, finally induced him to insure in this company. He was supplied with its blanks, and was employed and paid by it. This application was practically the work of Beals, though the stipulation on the face thereof provides that the answers and statements were made by plaintiff, or his authority; thus attempting to make the agent of the company the agent of the assured. The ordinary instructions of companies to their agents, and their dealings with them, are too well known for us to shut our eyes to the manner in which their work is carried on. This is but a form of words to attempt to create on paper an agency which, in fact, never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him, in the same manner, the agent of the assured, when, in fact, such relation never existed: *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521. We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact as it existed cannot be hidden in this manner; much less can it be destroyed, and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority: *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Kausal v. Minnesota Farmers' Mutual F. Ins. Ass'n*, 31 Minn. 17; 47 Am. Rep. 776;

Insurance Co. v. Wilkinson, 13 Wall. 222; *Hartford Protective Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Sprague v. Holland Ins. Co.*, 69 N. Y. 128; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535; *Iron Works v. Phœnix Ins. Co.*, 25 Conn. 465; *Clark v. Union Mutual F. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721; 2 Wood on Fire Insurance, secs. 385, 388; May on Insurance, sec. 140.

If we take the testimony of plaintiff to be true, as evidently the jury and court did, we must believe that he made a complete and truthful statement of the condition of the house, the stove-pipe in the kitchen, the way it passed through the roof, how it was secured, etc.; and also that the agent had examined the risk, and, from personal inspection and observation, knew all the surroundings. Indeed, he makes upon the back of the application his statement, as solicitor, that he had carefully examined the stove-pipes and chimneys, and after surveying the risk personally, he fully recommended it. But the defendant contends that because he was merely a solicitor, having authority only to take and forward applications, he could not make a contract for the company, and that the statement upon the back of the application was no part of it, but simply a memorandum between the company and Beals. It insists that *Sullivan v. Phœnix Ins. Co.*, *supra*, is not decisive of this case, for the reason that Forbriger, the agent of the company in that case, had full power to make the contract of insurance and issue a policy without consulting the officers of the company, while in this matter, Beals did not possess authority to make a contract for the company. We believe, under the evidence, that he was simply an agent, or solicitor, as he is called, with power only to take and forward applications. Yet the company cannot relieve itself of all liability for his acts for that reason. The company did make him its solicitor; and it must be presumed that he was given full power to take applications, and give such information to the company as he might obtain, either from the applicant or from other sources. For this purpose, at least, he was the agent of the company, with full power; and if he wrote down false statements after he had been truthfully informed by the applicant, and after a personal inspection of the premises, the assured should not suffer for his misrepresentations.

We will concede that the defendant believed that the statements in the application were correctly set forth in the appli-

cation, and if the company had known the actual facts, it would not have issued the policy, and that it was deceived by the application; but this will not relieve the company, because the deception was practiced upon it by its own agent, and not by the plaintiff: *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693; *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494; *Aurora Fire Ins. Co. v. Eddy*, 55 Id. 213. We are of the opinion that after the defendant had received the premium of the plaintiff, and issued him a policy, that it was estopped from denying the truth of the statement filled in by its own agent in the application of plaintiff. The knowledge that Beals possessed was, for the purposes of this action, the knowledge of the company. He was acting as its agent, and it was his especial duty to ascertain the actual facts about the risk, as the company made him its agent for that purpose. The application was good enough to secure the premium for the company; and where there was no fraud nor intention to deceive defendant on the part of plaintiff, it ought to be held sufficient, ordinarily, to recover the losses plaintiff has sustained. After the company has received the benefits of the contract, it ought not to be permitted to escape liability by questioning the statements of its own agent, and setting up his fraud as a defense against a party who has been truthful and honest: *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; 44 Am. Rep. 177; *Higgins v. Phoenix Ins. Co.*, 74 N. Y. 6; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Sherman v. Madison Mut. Life Ins. Co.*, 39 Wis. 104; *Patten v. Merchants' and F. Fire Ins. Co.*, 40 N. H. 375; *Breckinridge v. Am. Cent. Ins. Co.*, 87 Mo. 62; *Simmons v. Insurance Co.*, 8 W. Va. 474; *American Life Ins. Co. v. Mahone*, 56 Miss. 180; *Thomas v. Hartford Fire Ins. Co.*, 20 Mo. App. 150; *Mass. Life Ins. Co. v. Robinson*, 98 Ill. 324; *Home Ins. Co. v. Lewis*, 48 Tex. 622; *Berryman's Digest of Insurance*, 440 et seq.; *May on Insurance*, sec. 143; 1 *Wood on Fire Insurance*, sec. 143.

The defendant further complains that the statements of Beals upon the back of the application should not have been admitted in evidence, because they form no part of the contract. Perhaps they are no part of the contract between the parties, but they had their place and importance, else the company would not have prepared its blanks in the manner it did. They were evidently statements that defendant partially relied upon. They were admissible, if for no other reason, to tend to establish the fact that Beals knew the condition of the

premises; and that making a false statement of facts within his own knowledge at the time of taking the application, it tended to show that he filled it out with a view of obtaining the premium, rather than of correctly transcribing the answers of plaintiff.

The defendant argues with much force that the policy itself makes the representations of plaintiff warranties, and that if they were false, then the policy should be void. This is especially important in this case, for the reason that the fire originated from the stove-pipe in the kitchen roof, about which the false statements were made. The defendant claims that plaintiff was responsible for such statements because he signed the application after he had an opportunity to read and examine it, and having thus entered into an agreement, he should not be permitted to say that he did not sign it with full knowledge of its contents. When the application was taken, Beals handed it to plaintiff, who said: "You read it; I haven't my glasses with me," and then Beals read a part of it, but not the answers that were false. The first time plaintiff knew they were in the application, he learned it from another agent of the defendant, who came to adjust the loss. The plaintiff evidently trusted to Beals to fill out the application truthfully. He was not dishonest, did not misrepresent, and did not intend to deceive. The only thing that he was guilty of was, that he did not read the answers that he gave to Beals to transcribe. The dishonesty was all on the part of the agent of defendant. He evidently was anxious to secure the premium from plaintiff, and the defendant, in order to increase its business, was willing to intrust it in his hands. It held him out to those with whom he might deal as an honest, truthful man. It should be bound by his acts and representations. The agent might easily persuade himself to the belief that there was but a slight chance for the property to burn, and without a fire, these false statements would never be detected.

It is insisted that, under such circumstances, the assured should be bound by his written application, unless there was some crafty device or stratagem resorted to to prevent him from reading the application which he signed. This is the ordinary rule in signing a written contract or stipulation; but after the payment of the premium, we are unwilling to apply it to its full extent to the system of taking applications which is now almost universally adopted by insurance companies to

obtain business. Its practical application would work injustice to the insured. The company would secure the premiums and escape the payment of losses; and the parties who in good faith had paid it money, and believed their property insured, would find after its loss that they had been deluded. The only fault on the part of the insured would be in relying upon the statements of the agent of the company, while the company would receive the premiums, and, on the other hand, escape its liability on account of the deception of its own agent. The current of the later authorities seems to be that the agent who takes the application and obtains the policy must be regarded for those purposes as having full power to act for and bind the company; and after having received money from the insured, it cannot be heard to say that the statements in the application were false, when there was no fraud or attempt to deceive and misrepresent on the part of the assured. It is true that this current is not unbroken, but we believe the better reason is in its favor, because it would not permit the unwary to be ensnared and defrauded: *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622; 52 Am. Rep. 227.

We recommend that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

ALLEGATION OF NEW MATTER not constituting a counterclaim or set-off must be considered as denied, and must be proved by the party making the allegation: *Fahnestock v. Bailey*, 3 Met. (Ky.) 48; 77 Am. Dec. 161.

INSURANCE COMPANY IS CHARGEABLE WITH KNOWLEDGE of every fact of which its general agent has knowledge, and when the company fails promptly to repudiate the acts of such agent, it will be held to have ratified them, or to be estopped by its silence when it ought to have spoken: *Morrison v. Insurance Co.*, 69 Tex. 353; 5 Am. St. Rep. 63.

AGENT OF INSURANCE COMPANY IN FILLING BLANKS does not thereby become the agent of the applicant: *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65, and note 72; and see *Clark v. Union F. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721, and note 724-728, as to the effect of stipulations seeking to make the agent of the insurer the agent of the insured.

INSURANCE AGENT—ESTOPPEL.—Where an agent taking an application for insurance undertakes to write in the application the answers of the insured to the questions propounded to him, and the insured having answered truthfully, the agent nevertheless writes false answers, the company will be estopped from relying upon such misrepresentations to avoid the policy: *Western Assurance Co. v. Rector*, 85 Ky. 294. The agent of an insurance company filled out an application, and, without inquiry or authority from the insured,

inserted therein an answer stating that the property was unencumbered. He presented the application to the insured for signing, without acquainting him with its contents, and the latter signed it, not knowing that it contained such statement. The court decided that the insured was not bound by such statement, and that the company could not avoid the policy on the ground of its falsity: *Dunbar v. Phoenix Ins. Co. of Brooklyn*, 72 Wis. 492.

LEROY AND WESTERN RAILWAY Co. v. HAWK.

[39 KANSAS, 633.]

JURY MAY BE INTERROGATED AS TO ANY PARTICULAR ELEMENT OF DAMAGE SUFFERED, about which testimony is offered, in proceedings under the Kansas statute to condemn a right of way over lands for a railroad; but a refusal to submit a question asking the jury to state all the elements or sources of damage, and the amount allowed for each, is not erroneous.

OPINIONS OF FARMERS AS TO MARKET VALUE OF FARMING LAND ARE ADMISSIBLE IN CONDEMNATION PROCEEDINGS, where they live in the vicinity of the land, are acquainted with its situation and quality, its advantages and disadvantages, and state that they know its value, although they may not have been engaged in buying and selling land, and they have no knowledge of an actual sale of the land in question, or of similar land.

APPEAL from the report of commissioners appointed to condemn a right of way over lands for a railroad. The facts are stated in the opinion.

W. P. Hackney, for the plaintiff in error.

Haughey and McBride, for the defendant in error.

JOHNSTON, J. This action was brought to the district court of Sumner County on appeal by Rachel A. Hawk from the report of the commissioners appointed by the judge of the district court of that county, to condemn a right of way for the Leroy and Western Railway Company through a portion of Sumner County, and across an eighty-acre tract of land belonging to Rachel A. Hawk. The commissioners had reported that appellant would suffer damages, by reason of the construction of the road through her premises, in the sum of \$164; and at a trial, which was had with a jury on December 18, 1886, there was a verdict assessing the appellant's damages at \$700. A motion for a new trial was overruled, and judgment was entered upon the verdict. The railway company has removed the cause to this court, and asks for a reversal, upon three grounds: 1. Error in refusing to submit certain special questions; 2. In permitting incompetent witnesses to testify as to

the value of the land; 3. In giving improper instructions to the jury.

The court refused to submit the question, "How much was the damage to the farm by reason of the water in the ditch, thereby causing the adjacent land belonging to the plaintiff to cave in?" The question was not warranted by the testimony offered in the case, and its refusal was not erroneous.

The court was further requested to submit to the jury the question, "What damage resulted to the farm by reason of the scaring of stock by the company's cars?" But this was properly denied, as the jury were charged that they had no right to take into consideration in their estimate of damages any risks which the appellant might incur in the way of scaring her stock and teams, as such damages were speculative only.

The third question refused, and about which complaint is made, was, "What are the several elements or sources of the damages which make up the aggregate to the answer to special question No. 10, and how much of said aggregate is made up by each of said elements or sources of damage?" Finding No. 10, referred to, is, "How much damage to the land by reason of the inconvenience for farming and using and occupying such land caused by the building of said railway through, over, and across said land?" A. "\$380." This method of questioning a jury would serve no good purpose, and is not permissible. A party desiring special findings should submit particular questions instead of general ones, and should not leave the jury to analyze and separately state the constituent elements of the damage suffered. The jury may be interrogated as to any particular element about which there was testimony offered, but to require them to distinguish and describe all the sources of damage, and the amount allowed for each, would probably result in confusion, delay, and uncertainty. Such a procedure is not within the purpose of the statute, and has already been disapproved of by this court: *Leavenworth etc. R'y Co. v. Paul*, 28 Kan. 816; *Foster v. Turner*, 31 Id. 58.

The next objection is, that the opinions of incompetent witnesses as to the market value of the land were received. These witnesses were farmers living in the neighborhood of the land in question, well acquainted with its situation and fertility, its advantages and disadvantages, and they were therefore qualified to state their opinions in regard to its value before and after the railroad was constructed through it. This is not a

question of science or skill, requiring expert testimony, but it falls within one of the exceptions to the rule excluding mere opinions of ordinary witnesses. It is not necessary that the witnesses shall be engaged in buying and selling land, nor that they should have knowledge of an actual sale of that or similar land, to make them competent. A farmer living in the vicinity is presumed to be familiar with and to know the value of farm lands, and there can be no doubt of his competency when it is shown that he knows the situation and character of the land, its productiveness and availability for use, and who further states that he knows the value of the same, as did the witnesses in the present case: *Kansas City R'y Co. v. Allen*, 24 Kan. 33; *Robertson v. Knapp*, 35 N. Y. 91; *Keithsburg etc. R. R. Co. v. Henry*, 79 Ill. 290; *Pennsylvania etc. R. R. Co. v. Bunnell*, 81 Pa. St. 425; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Montana R'y Co. v. Warren*, 6 Mont. 275; *Sutherland on Damages*, 463; *Lawson's Opinion Evidence*, 435.

The final objection made to a portion of the charge given to the jury is not available. No exception to the instruction was taken at the trial, nor does the record disclose that there was an exception, either general or special, to any portion of the charge; and hence its correctness is not now open to inquiry.

We find no error in the record, and therefore will affirm the judgment of the district court.

ELEMENTS CONSTITUTING DAMAGES RECOVERABLE in eminent-domain proceedings: *Ohio etc. R. R. Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532, and note 537-540. The jury, under the Kansas statute regarding condemnation proceedings, may be interrogated as to any particular element of damage suffered by reason of the construction of the railroad over the land; but a refusal to submit questions asking the jury to state all the elements of damage, and the amount allowed for each, is not error: *Le Roy & T. R'y Co. v. Hollis*, 39 Kan. 646.

OPINIONS OF WITNESSES ARE ADMISSIBLE TO PROVE the value of land taken by a railroad company under the right of eminent domain: *St. Louis etc. R. R. Co. v. Chapman*, 38 Kan. 307; 5 Am. St. Rep. 744; *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51, and note 60. In an action for damages to a farm caused by taking the right of way for a railroad, the testimony of farmers who lived in the neighborhood of the farm in question, and who stated that they knew the value of lands there, was competent on the question of damages: *Ball v. K. & N. W. R'y Co.*, 74 Iowa, 132.

STATE EX REL. ROBB v. COMMISSIONERS OF KIOWA COUNTY.

[39 KANSAS, 657.]

NEGOTIABLE COUNTY BONDS ARE VALID IN HANDS OF BONA FIDE PURCHASERS FOR VALUE, notwithstanding there were such irregularities in calling and holding the elections authorizing their issue that if the question of their validity had been raised in the proper manner and at the proper time, they would have been held invalid.

MANDAMUS. The facts are stated in the opinion.

Robb and Vandivert, for the plaintiff.

Rush and Dempcy, and Johnson, Martin, and Keeler, for the defendants.

PER CURIAM. This is an action of *mandamus*, brought originally in this court in the name of the state of Kansas, on the relation of the county attorney of Edwards County, to compel the county commissioners of Kiowa County, among other things, to levy a tax to pay interest on a certain bridge bond issued by Edwards County, and to levy a tax to pay interest on certain court-house and jail bonds issued by that county. The defendants have answered, and, among other things, have alleged that such bonds were not legally issued, and this for the reason, as it would seem, that the elections authorizing their issue were not legally held. The plaintiff has moved the court to strike out all that part of the answer which relates to the bridge bond and to the court-house and jail bonds, and this presents the question now under consideration. Taking the alternative writ and the answer together, it must be presumed from their allegations that elections were held for the purpose of authorizing the issue of the foregoing bonds; but that there were such irregularities in the calling and in the holding of such elections, that if the question of their validity had been raised in the proper manner and at the proper time, they would have been held to be invalid; but no such question was raised until after the bonds were issued, and until after they had gone into the hands of innocent and *bona fide* purchasers for value; and the bonds were and are negotiable. We think no question is raised by this motion as to whether Kiowa County, or any portion thereof, is liable on these bonds, provided they are valid as against Edwards County; but the only question that is raised by the motion is, whether Edwards County is so

liable or not; or in other words, the question is, whether the bonds are valid or not in the hands of innocent and *bona fide* purchasers for value as against Edwards County. We think this question must be answered in the affirmative: *Burroughs on Public Securities*, 320 et seq.; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *Gelpcke v. City of Dubuque*, 1 Wall. 176; *Supervisors v. Schenck*, 5 Id. 772; *Lynde v. County*, 16 Id. 6; *Town of Coloma v. Eaves*, 92 U. S. 484; *Marcy v. Township of Oswego*, 92 Id. 637; *Commissioners of Douglas Co. v. Bolles*, 94 Id. 104; *Commissioners of Johnson Co. v. January*, 94 Id. 202; *County of Warren v. Marcy*, 97 Id. 96; *Wilson v. Salamanca*, 99 Id. 499.

The motion of the plaintiff will be sustained.

WHERE county bonds are, by special act of legislature, authorized to be issued upon a popular vote "specifying the amount," and the bonds are issued upon a popular vote which failed to "specify the amount," this circumstance will be deemed an irregularity merely, and not sufficient to render the bonds void in the hands of *bona fide* holders: *State v. Saline County Court*, 48 Mo. 390; 8 Am. Rep. 108; compare *Steines v. Franklin County*, 48 Mo. 167; 8 Am. Rep. 87, and note 100, *Deming v. Houlton*, 64 Mo. 254; 18 Am. Rep. 253, and note 259.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

AMERICAN MUTUAL AID SOCIETY v. HELBURN.

[85 KENTUCKY, 1.]

LIFE INSURANCE. — MUTUAL BENEFIT SOCIETY IN MAKING ASSESSMENTS UPON ITS MEMBERS does not act in a judicial but in a ministerial capacity, and no presumption can arise in favor of the regularity or legality of its assessments.

LIFE INSURANCE. — WHEN MUTUAL BENEFIT SOCIETY RELIES UPON FAILURE OF ANY MEMBER to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the mode pointed out in the charter; otherwise the member cannot be said to be in default.

LIFE INSURANCE. — AVERMENT IN PLEADING THAT CERTAIN ASSESSMENT "WAS DULY MADE by defendant in accordance with its charter" asserts no fact, but pleads only a conclusion of law, and is radically defective.

Simrall and Bodley, and F. W. Morancy, for the appellant.

M. A. and D. A. Sachs, for the appellees.

BENNETT, J. By an act of the Kentucky legislature approved January 9, 1880, appellant was created a body politic for the purpose of providing financial aid to the widows, orphans, heirs, legatees, and assigns of its deceased members.

On the tenth day of August, 1881, Samuel Helburn became a member of appellant's society, and received a certificate of membership from appellant, in which appellant agreed to pay the appellees, sons of Samuel Helburn, in sixty days after satisfactory proof of the death of Samuel Helburn, the sum of money to which the beneficiaries might be entitled.

The eighth section of the act provides that the beneficiary of the deceased member shall receive a benefit, not to exceed

three thousand dollars, payable within sixty days from the date of satisfactory proof of death, etc.

On the twenty-fifth day of April, 1884, Samuel Helburn died, and the appellees presented to appellant proper proof of his death, and demanded the payment of the sum of three thousand dollars, which they alleged was due them according to the terms of said certificate and membership of Samuel Helburn. The appellant refused to pay said sum, or any part of it. Thereupon appellees brought suit in the Jefferson court of common pleas against the appellant, by which they sought to recover judgment against the appellant for the sum of three thousand dollars. The appellant, by its answer, attempted to defend the action upon the ground that Samuel Helburn, in his lifetime, had failed to pay some assessments made against him by the appellant, to meet the payment of the policies of several members of said society who had died, and that he refused to pay said assessments, and by reason thereof he forfeited his membership in said society, and all benefits arising from his membership therein. The lower court sustained a demurrer to the answer. Appellant then amended its answer. A demurrer was sustained to the amended answer. The appellant again amended its answer. A demurrer was sustained to that also. Another amendment was offered, which the court rejected, and thereupon gave judgment for the appellees for the sum of three thousand dollars. So much of the answer as it is material to notice is as follows: "Defendant says that on the first day of February, 1884, three assessments of \$1.80 each were duly made by defendant against and due notice thereof given to Samuel Helburn, in accordance with the terms of said charter, upon the deaths of Mr. Moran, who died December 7, 1883, and Susan W. Harrison, who died December 9, 1883, and E. T. Hamilton, who died December 11, 1883, who died members of said society; and payment of said assessments, which amounted to \$5.40, was by it demanded of said Samuel Helburn, who failed and refused to pay the same," etc.

The third section of appellant's charter provides that it shall be controlled by a board of directors. The thirteenth section provides that the board of directors may appoint an executive committee of three, to make assessments, etc. Section 10 provides that "upon the death of any member of the society, each surviving member may be assessed, and when assessed shall pay to the secretary as follows: Members of the

first class, 90 cents; members of the second class, 95 cents; members of the third class, \$1.15; and members of the fourth class, \$1.80." Section 11 provides that "any member failing to pay his annual dues or assessment within thirty days after notice has been served upon him or sent to him shall forfeit his membership and all benefits arising therefrom," etc. Section 12 provides for the raising of a permanent fund from so much of the admission fees, annual dues, and assessments not used in paying benefits and expenses. And if said permanent fund should at any time reach an amount sufficiently large, in the opinion of the directors, they may have the power to suspend the assessments and pay the benefits out of said fund, so long as they may think it safe to do so.

The foregoing quotations from appellant's charter show: 1. That assessments to pay the benefits to the representatives of its deceased members must be made upon the surviving members of the society by its board of directors, or that they may delegate that authority to an executive committee; 2. That by the direction of the board of directors, the benefits due to the representatives of the society's deceased members need not be raised by assessments on its surviving members, but may be paid out of the society's permanent fund. Thus we see that no assessment can be made on the surviving members of the society to pay the benefits due the representatives of its deceased members, unless the assessments are made by the board of directors, or by an executive committee appointed by them for that purpose. Also that the board of directors may dispense with the assessments on the surviving members, and direct the payment of the benefits to be made out of the permanent fund. Under the charter, no legal assessment can be made upon the surviving members of the society to pay the benefits due the representatives of its deceased members, except in the manner above indicated. Also, the board of directors have a discretion to dispense with said assessments, and direct the payment of the benefits out of the permanent fund. And no one but the board of directors has this power. The question then arises, Before a member of the society can be compelled to pay an assessment against him, or forfeit his membership and benefits arising therefrom by reason of his failure to pay the assessment made against him, should it not appear affirmatively that the assessment was legally made, to wit, by the board of directors themselves, or by an executive

committee duly appointed by them to make the assessment on the members of the society?

May on Insurance, section 557, says: "An assessment can only be valid when laid under the conditions stated in the charter. A general vote of the directors to assess to a certain amount to pay the indebtedness of the company is no valid assessment. It must appear that such a state of affairs existed when the vote was passed as to authorize the vote itself, as that losses and expenses had actually been incurred beyond the available assets in hand, which could not be met but by an assessment. . . . The liability of the assured is conditional, and depends upon the contingency of the happening of losses and expenses to which he shall be liable to contribute, which have been duly ascertained by the directors, and which make necessary a resort to an assessment thereon. It is a credit given for a part of the consideration of the contract. The promise of the insured is to pay upon such conditions, and the existence of these conditions must be established affirmatively before a call for payment . . . can be enforced. . . . And the assessment must be made in strict accordance with the authority given. Even a more equitable mode than that provided by the charter cannot be adopted. Where the charter authorizes the directors to make an assessment, it can be made by them only."

In the case of *Thomas v. Whallon*, 31 Barb. 178, the court held that the promise of the assured is to pay upon certain conditions, and the existence of those conditions must be shown to exist. "If the directors of the company in making the assessment acted judicially, the assessment itself perhaps would be evidence, at least *prima facie*, of the necessity; but they do not act judicially, but ministerially, and they have no arbitrary discretion in the matter; but they are controlled by the explicit provisions of the statute, and must, by proper averments and proof, bring themselves within the terms of those provisions before they can enforce the collection of the premium notes." In the case of *Long Pond Mutual Fire Ins. Co. v. Houghton*, 6 Gray, 77, citing 2 Id. 279, it was held that the burden was upon the plaintiff to establish the fact of a legal assessment. In the case of *Pacific Mutual Ins. Co. v. Guse*, 49 Mo. 332, 8 Am. Rep. 132, the court held that it devolved upon the plaintiff to aver and prove that the contingency had happened upon which the defendant's liability had become absolute; that there is no arbitrary discretion to

make assessments by the directors, and that they do not act judicially, but ministerially, and assessments cannot be made unless the necessity therefor properly and legally arises. In the case of *Embree v. Shideler*, 36 Ind. 430, the court held that an assessment or apportionment was a condition precedent necessary to be averred in the complaint, and is not complete and consummated until it is ascertained, fixed, and determined by carrying out upon the extension-book the amount that each member is to pay; that the directors of the company have no arbitrary discretion in making an assessment, but they are controlled by the explicit provisions of the statute, and must, by proper averments and proof, bring themselves within those terms and provisions," etc.

Thus we see that in making assessments by the appellant upon its members, it does not act in a judicial, but in a ministerial, capacity. Therefore no presumption can arise in favor of the regularity or legality of its assessment; that the appellant's board of directors, or an executive committee appointed by them, are the only persons authorized by appellant's charter to make assessments against its surviving members to pay the benefits due the representatives of its deceased members; that a deceased member of the society should have died, and that his representative was entitled to a benefit arising from his death, and that an assessment upon all of the surviving members was actually made by the board of directors, or an executive committee appointed by them, for the purpose of paying said assessments, are conditions precedent to the right of the appellant to demand payment of an assessment from any of its members. And they are not bound to pay any assessment until these things occur. Nor do they forfeit their membership by reason of their failure to pay such assessments, unless these things have occurred. And when the society relies upon the failure of any of its members to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the manner indicated, otherwise the member cannot be said to be in default. The appellant's answer, tested by these rules, is radically defective. There is no allegation in it that the assessment was made by the board of directors, or by an executive committee appointed by the board of directors. The allegation is, that "the assessment was duly made against Samuel Helburn by defendant in accordance with its charter." The word "duly," preceding the word

"assessment," signifies nothing but the conclusion of the pleader. It asserts no fact. The word "assessment" does not mean that the appellant, by its board of directors, or executive committee appointed by the board of directors, made the assessment. The words "in accordance with its charter" plead merely a conclusion of law. They assert no fact: *Ormsby v. Louisville*, 79 Ky. 197. Neither of the amendments filed by the appellant cured this defect, nor did the amendment offered by the appellant, and rejected by the court, cure it.

For the foregoing reasons, the judgment of the lower court is affirmed.

WAIVER OF FORFEITURE OF LIFE POLICY FOR NON-PAYMENT OF PREMIUMS: See *Holman v. Continental Life Ins. Co.*, 54 Conn. 195; 1 Am. St. Rep. 97, and cases collected in note 111; *Bailey v. Mutual Ben. Ass'n*, 71 Iowa, 689; *Tobin v. Western Mutual Aid Society*, 72 Id. 261.

PLEADING SHOULD STATE FACTS, and the averments of legal conclusions drawn from the facts stated are in no way necessary to the full presentation of the right claimed, and are properly stricken out on motion: *Morrison v. Ins. Co.*, 69 Tex. 353; 5 Am. St. Rep. 63; *Hewison v. New Haven*, 34 Conn. 136; 91 Am. Dec. 718.

HART v. COMMONWEALTH.

[85 KENTUCKY, 77.]

CRIMINAL LAW—EVIDENCE.—UPON TRIAL FOR MURDER OR MANSLAUGHTER, THREATS MADE BY THE DECEASED against the accused, although not communicated to him, are competent as evidence upon the question whether the one or the other was the aggressor, and whether the act of the accused was done in defending himself.

George Denny, Jr., and Watts Parker, for the appellant.

P. W. Hardin, for the appellee.

HOLT, J. This is a conviction for voluntary manslaughter. In a difficulty between the appellant, Levi Hart, and John Veal, a by-stander, who was in no wise engaged in it, by the name of Charles Waller, was shot and instantly killed. A jury have found that the appellant did it. If so, it was undoubtedly unintentional upon his part, and done in shooting at Veal, who was also then killed. The case therefore turns upon whether the conduct of the appellant in so shooting was excusable. If he was first attacked by Veal, and acted only in self-defense, then it was excusable homicide.

The testimony is very conflicting as to whether the appellant or Veal began the conflict. Some witnesses testify that the one and some that the other made the first offensive movement, and fired the first shot.

The appellant offered to prove that on the day previous to the killing, Veal said that he would elect his man at the election which was to occur the next day, or kill the appellant. This threat was not communicated to the accused, and the testimony was rejected. It is urged that it was competent by way of showing who brought on the difficulty. The two men were opposing each other, being for different candidates. The threat substantially fixed a time when in a certain event it would be carried out. The difficulty did then occur; the event named was then in progress; and the issue now being who was the aggressor, is the evidence of the uncommunicated threat by the deceased competent to illustrate it? The question has not been heretofore directly decided by this court, and indeed, we have little authority to guide us to a correct conclusion.

In the case of *Cornelius v. Commonwealth*, 15 B. Mon. 539, the prisoner, who was being tried upon the charge of murder, introduced evidence of threats which had been communicated to him, and which had been made by the deceased. He then offered to prove other threats upon the part of the accused, made a few days before the killing, and which had not been communicated to the prisoner. The lower court excluded them; but this court said: "We think that this testimony should, under the circumstances in this case, have been admitted. It tended to confirm the other evidence that Hopson had made threats against the prisoner, and to counteract a presumption of fabrication by the witnesses who gave that testimony. Besides, Hopson's intention to make an attack on the accused was an important matter, as well as the belief of the existence of such an intention on the part of the prisoner."

In the case just cited, the admissibility of the uncommunicated threats was based upon the fact that they tended to confirm the communicated threats, and also evinced the intention of the deceased, and illustrated the question whether the one or the other was the aggressor. In the case now before us, no communicated threats were proven; hence the naked question is in hand, whether uncommunicated threats by the deceased are admissible for the purpose of showing whether he or the accused began the difficulty, when this is in issue. In deter-

mining it, it must be kept in mind that the question before the jury is, whether the accused is excusable upon the ground that the act was done by him in defending himself against an unlawful attempt by Veal to kill him, or inflict upon him great bodily harm.

Threats to commit the crime for which one is on trial are competent as evidence against him upon the question whether he in fact did it, because they show an intention to do it, and therefore a probability is created that he is the person who did it.

If A enters a house where B is, and just before doing so he avows an intention to kill B, and shortly after entering, a difficulty between them occurs, in which A is killed, and it is a question which one of them began it, certainly the declaration of A, although uncommunicated to B, would be competent evidence to illustrate the question who was the aggressor, and as tending to show that A made the attempt to carry out his threat. There is in principle no difference between this evidence and that which we are now considering, save in degree. In the one case the threat would, in point of time, be more convincing, perhaps; but the only difference would be in the weight of the testimony. It may be said that threats are often the subject of false testimony, and that mischief will result from such a rule. This is true, however, to a greater or less extent, of any species of testimony; and the tendency of the age is to widen the door for the admission of evidence, because it has been found by experience that justice is thereby promoted.

In the case of *Jewett v. Banning*, 21 N. Y. 27, it was held in an action for an assault and battery, alleged to have been committed in the absence of witnesses, that evidence of former ill will by the defendant against the plaintiff was competent as a circumstance to show its commission.

In 1 Wharton's Criminal Law, section 642, it is said: "Where A is charged with a murderous assault upon B, or with killing B (the plea of self-defense not being set up), remarks or threats affecting A, made by B to a third party before the assault, are not admissible in A's behalf; especially when it does not appear at what time they are communicated to him. Yet, if the question is whether the deceased was the assailant, the fact that he declared beforehand that he meant to attack the defendant is material; nor, on this issue, is it necessary that the defendant should be proved to have had notice of such threats."

Again, in volume 2, section 1027, the author says: "Where the question is as to what was the deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant."

In the case of *Stokes* for the killing of James Fisk, 53 N. Y. 164, 13 Am. Rep. 492, the question was directly presented; and it was there held that where it was a question before the jury whether the act of the accused was done in defending himself, that recent threats upon the part of the deceased toward him were competent as evidence, although they had not been communicated to him. They of course are not competent to show the *quo animo* of the defendant, or from what belief he may be actuated, because, not having been communicated, he can have none by reason of them. But where the question is at issue, whether the one or the other was the aggressor, where there were no witnesses to the transaction, or if there were, the matter is in doubt, we conclude that such testimony, be it worth much or little, is admissible as an aid to its solution.

We perceive no other error in the record; but for that indicated the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

HOMICIDE. — ADMISSIBILITY IN EVIDENCE of threats made by deceased: *Dukes v. State*, 11 Ind. 557; 71 Am. Dec. 371, 380, note; *Campbell v. People*, 16 Ill. 17; 61 Am. Dec. 49; *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269; *Brumley v. State*, 21 Tex. App. 222; 57 Am. Rep. 612.

HOMICIDE IS NOT EXCUSED BY THREATS OF DECEASED COMMUNICATED to the accused, but unaccompanied by acts endangering his safety: *People v. Campbell*, 59 Cal. 243; 43 Am. Rep. 257; *Gilmore v. People*, 124 Ill. 380.

GREENHILL v. BIGGS.

[85 KENTUCKY, 155.]

CO-TENANCY — ADVERSE POSSESSION. — ALTHOUGH, AS GENERAL RULE, ENTRY OF ONE TENANT IN COMMON WILL INURE to the benefit of all, yet he may so enter and hold as to render his entry and possession adverse, and an ouster of co-tenants; and where the vendee of one tenant in common sets up claim in his own right to the whole tract of land, and enters and holds possession openly and continuously for more than the statutory period, his possession is adverse, and a recovery by the other tenants in common is barred, although they had no actual notice of the adverse character of the possession.

ACTION to recover a certain tract of land. The opinion states the case.

William Bowling, for the appellant.

J. D. Jones, R. D. Davis, E. F. Dulin, and A. Duvall, for the appellees.

LEWIS, J. About the year 1840 Hiram Biggs purchased of one Rice, the patentee, the land in controversy, receiving a bond for title, but, without taking actual possession, removed to the state of Ohio, where he died about 1841 or 1842. And some time thereafter, his widow and eight children removed on the land, erecting a house and occupying it until 1848, when the title bond given by Rice was assigned, or attempted to be assigned, by the widow and three of the children to Thompson, who thereupon took possession. Thompson sold the land soon after his purchase to Pennington, and he to Dickerson, who held possession until 1861 or 1862, when he sold it to Ross, who held and claimed all the land as his own until 1869, when he sold and conveyed it to appellant, Greenhill, who has held and claimed it ever since.

This action was brought May 9, 1881, by the seven heirs at law of Hiram Biggs, one of them having died, to recover the entire tract. But the court rendered judgment for only four sevenths, dismissing the petition as to the three children, who, with their mother, executed the assignment of the title bond to Thompson in 1848.

There is filed as an exhibit with the amended petition a copy of the record, or part of the record, of an action by Thompson against Rice and the widow and children of Hiram Biggs, instituted in 1854, in which he filed the title bond mentioned, and asked for a conveyance to him by Rice of three eighths, intended to be three sevenths of the land, in virtue of the sale and transfer to him by the widow and three children in 1848, and judgment was in 1859, in that action, rendered accordingly. But whether a deed was made to him, or to the other four children of Hiram Biggs, in pursuance of the judgment, does not appear. But in 1865 he made an absolute deed for the whole land in severalty to Ross, who was then in possession, as he had been since 1862, when he purchased from Dickerson.

At the date of the assignment of the bond, in 1848, none of the children were of full age, and it of course might thereafter have been avoided by the three children. But all were

of the age of twenty-one years in 1865, when the deed was made by Thompson to Ross.

The ground upon which the lower court decided the statute of limitation constituted no bar to recovery by the four children not parties to the assignment in 1848, and rendered judgment in their favor for four sevenths of the land, is, that Thompson and his vendees entered and held as tenants in common with them.

There can be no question of the correctness and frequent application by this court of the general rule that the entry of one tenant in common will inure to the benefit of all. But, in regard to it, this court, in the case of *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177, said: "This proposition is based upon the supposition that the entry is made either *eo nomine* as tenants in common, or that it is silently made, without any particular avowal in regard to it, or without notice to a co-tenant that it was adverse. An entry of the latter character would not be presumed adverse. So, also, possession by one tenant in common as such will be the possession of the co-tenants also; and in the absence of proof to the contrary, the presumption would be that the possession was so held. But the doctrine has been long since held, and the authorities already cited sustain it, that one tenant in common may so enter and hold as to render the entry and possession adverse, and amount to an ouster of a co-tenant."

We do not think the thirty years' statute can avail appellant in this case. For although more than that period of time elapsed from 1848 to the commencement of this action, in 1881, there is not sufficient evidence to show that Thompson, or any of his vendees, previous to 1865, purchased, claimed, or held the whole land in severalty. On the contrary, Thompson, in the action instituted by him in 1854, presumably for the benefit of his vendees, claimed only an undivided interest of three sevenths, and recognized the title of appellees to the remaining four sevenths. Consequently, the cause of action did not accrue to appellees until after that time.

But from 1865, Ross and appellant, his immediate vendee, held and claimed under the deed of that date, which conveyed title to the whole land, and their possession, having been actual, open, and continuous, amounted to a denial of the title of appellees to any part of it. It is true, it does not satisfactorily appear that appellees had actual notice fifteen years

before the commencement of this action that the possession was claimed to be adverse to them. But actual notice has never been held by this court to be necessary in order to constitute adverse holding a bar to recovery in such case, it being deemed sufficient when one joint owner holds and claims the land continuously, and in such manner as to apprise the other joint owner's of the adverse character of the possession: *Russell's Heirs v. Marks's Heirs*, 3 Met. 37.

In *Farrow's Heirs v. Edmundson*, 4 B. Mon. 605, 41 Am. Dec. 250, decided in 1844, it was held that, in analogy to the rules applicable to landlord and tenant, an agent might place himself in a hostile attitude to his principal, and by openly and publicly claiming and treating the land as his own, alienating portions of it and delivering the possession, and continuing such acts for more than twenty years, justify a presumption of notice from the time he thus placed himself in an attitude of hostility to the title of his principal.

In *Riggs v. Dooley*, 7 B. Mon. 236, it was held that as soon as the purchaser of one tenant in common set up claim in his own right to the whole tract, and claimed to hold against all the heirs, his possession was adverse, and the statute commenced running against the two heirs who had been tenants in common with him, as soon as they had notice of the adverse holding. And after a lapse of twenty years' continued assertion of right, notice from the commencement of the adverse holding might be presumed. And it was so expressly held in *Russell's Heirs v. Marks's Heirs*, just referred to: *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177; *Larman v. Huey's Heirs*, 13 Id. 436.

In this case, the evidence is conclusive that from 1865 Ross and appellant held and claimed the land adverse to the title of appellees, openly and continuously, and in such manner as to apprise them, for more than fifteen years before the commencement of the action; and according to the well-settled doctrine of this court, and the policy of the law, they must be presumed to have had notice thereof from the commencement of the adverse possession. Consequently, the statute of limitation is a bar to any recovery, and the judgment must be reversed, and cause remanded, with directions to dismiss the petition of appellees.

CO-TENANCY — OUSTER AS BETWEEN TENANTS IN COMMON: *Anney v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and cases collected in note 733; *Burns v. Headrick*, 85 Tenn. 102.

SOLE USE AND OCCUPATION OF COMMON PROPERTY BY ONE TENANT IN COMMON DOES NOT CREATE RELATION OF LANDLORD AND TENANT between him and his co-tenant, nor render him liable for rent, whether the property be real or personal: *Hamby v. Wall*, 48 Ark. 135; 3 Am. St. Rep. 218.

TENANT IN COMMON CANNOT MAKE HIS POSSESSION ADVERSE TO HIS CO-TENANT, EXCEPT BY ACTUAL OUSTER, or, in the absence of that, it takes twenty years' adverse possession to bar the co-tenant's right of entry: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281; *Breden v. McLaurin*, 98 N. C. 307.

HARPER v. HARPER.

[85 KENTUCKY, 160.]

EQUITY. — **COURT OF EQUITY WILL SET ASIDE CONVEYANCE AT INSTANCE OF GRANTOR**, although it was intended to defeat the law, if the parties did not stand upon an equal footing, and the conveyance was procured through the false representations of the grantee. In such case, the parties are *in delicto*, but not *in pari delicto*.

CONVEYANCE BY AGED MOTHER OF BULK OF HER ESTATE TO HER SON, INDUCED thereto by the latter's false and fraudulent representation that a suit for slander was about to be commenced against her, which would result in the loss of all her property, will be set aside at the instance of the grantor.

Fontaine T. Fox, Jr., for the appellant.

J. T. O'Neal and W. L. Jackson, Jr., for the appellees.

HOLT, J. When the conveyances now in question were executed, the appellant, Harriet Harper, was a widow, and seventy-three years of age. She then had three living children, two of whom resided in distant states, while her son, the appellee, Charles Harper, who was then thirty-five years old, lived near her, and in whom at that time she appears to have had implicit confidence. She was the owner of three houses and lots in the city of Louisville. On February 21, 1881, she had her vendor convey one of them, subject to a life estate in her, to Sallie Harper, the daughter of her son, Charles Harper, with the further condition that in the event of the granddaughter's death without lawful issue, it should pass to a grandson, Arthur Harper, the son of Charles Harper. On September 27, 1881, she conveyed the other two lots to Charles Harper, in trust, to be conveyed by him to his two children, Sallie and Arthur, when they became of age; but if either died before that time, then the survivor was to have them; or if both so died, then they were to pass to Charles Harper. She retained no estate of any character in these two lots, or

any interest in the revenue arising therefrom. Upon the contrary, the deed provided that the profits thereof were to go,— 1. To pay taxes, insurance, and necessary repairs upon the property; 2. For the support and education of the two children; and any residue remaining was to be invested until their majority for their benefit. This left her with but little, if any, estate, save her life interest in the lot conveyed by the first-named deed, and upon which there is a small house, in which she is now residing. In fact, she is now, in her old age, in destitute circumstances, while her son Charles and his family are living upon the rents arising from the property covered by the trust deed. She asks that both deeds be set aside, upon the ground that their execution was procured by false representations made to her by her son, Charles Harper. The petition also substantially states, but not in express words, that they were obtained by undue influence upon his part over her; and the answer makes this issue by expressly denying it. She avers that a considerable sum of money was stolen from her; that she accused a certain person of the offense upon information given to her by her son, the appellee, Charles Harper; that he falsely and fraudulently represented to her, and induced her to believe, that the accused party was about to sue her for slander; that it would result in the loss of all of her property, and reduce her to poverty, and thus procured her to execute the deeds, ostensibly to protect her, but in fact to obtain the estate for himself. The testimony of the appellant supports this version of the transaction, but is in direct conflict with that of her son. The wife of the latter also contradicts the appellant to some extent; but of course the representations might have been made without her knowledge. The attorney who prepared the trust deed testifies that it was done by the direction of the appellant, and that she understood it.

But two other witnesses testify in the case. They are disinterested. The one says that he heard the appellant say that she intended to give her property to Charles Harper's children. The other testifies that the appellee, Charles Harper, told him that his mother had charged the party with the theft; that he was afraid she would be sued for it; that he wanted to fix her property so that, in that event, a judgment could not be collected, and that this was the object of the trust deed.

This is substantially all the testimony in the case. It

appears, however, that the money was not lost until July 11, 1881; and the attack upon the deed of February 21, 1881, appears to have been abandoned during the progress of the case. In fact, the appellant, in her testimony, does not seem to question it, nor is it now assailed in argument. No further notice will therefore be taken of it.

It is impossible to be entirely sure of the true state of case, owing to the contradictory character of the testimony. The probabilities must therefore be thrown into the scale. The surrounding circumstances must be considered. They favor her claim. It is difficult to suppose that the appellant would have deeded away nearly all of her property, reserving not even a life estate in it, or any of the income arising from it, and leaving her without any means of support, unless there had been some motive or impelling power driving her from competency to poverty stronger than her affection for her grandchildren. It occurred, too, soon after the loss of her money. No cause, sufficient in our opinion to account for it, is even hinted at in this record, save the fear of a suit for slander, and the possible consequent loss of her property. There is no testimony in the case tending to show that this belief was created in her mind in any other way than through the talk of her son to her. If it existed, as we think it did, then its creation is unaccounted for save in this way. No suit was ever brought, and it is not shown that the party ever intended to bring any. Indeed, it was utterly unheard of, so far as this record discloses, save from the tongue of Charles Harper, but yet the old lady's mind was filled with this belief. In her imagination, poverty in her old age stared her in the face. Grim want was at her door; and in this supposed emergency she had no one at hand to trust, or upon whose judgment she could rely, save that son, in whom not only her confidence was reposed, but an undoubting faith that he would do right by his mother. It is urged, however, that if this be so, yet she must be turned out of court, because it was an effort to defeat the law, to which she was a party. *Inter partes in pari delicto, potior est conditio defendentis.*

It is true that in cases of executed contracts, if the parties be *in pari delicto*, they will be left where they have placed themselves. They do not come into court with clean hands. If, however, one party is but an instrument in the hands of the other, then they are not *in pari delicto*. Judge Story says: "One party may act under circumstances of oppression, im-

position, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offense." In such a case they are, perhaps, *in delicto*, but not *in pari delicto*. The act may indeed be substantially that of the one party. Thus the law forbids the payment of usury; but if the borrower seeks equity for relief, it will be afforded; or if he has paid it, he may recover it back. The rule *particeps criminis* does not apply. He is not *in pari delicto*. He is the slave of the lender,—is *in vinculis*,—and must submit to his necessities.

A court of equity will interpose and set aside an instrument as between the parties to it, although it was intended to defeat the law, if the parties did not stand upon an equal footing, and if the one influenced and controlled the conduct of the other; and when a relation of trust and confidence exists, the party in whom it is reposed, and who has obtained a benefit, should show an undoubted right to it. The *onus* is upon him to make it appear that the transaction was fair and proper; and relief will not be denied to the one least in fault, if he has been led into it in violation of confidence and by exciting false alarms or fear of legal consequences. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threats upon the one side, and confidence or weakness upon the other, equity will grant relief to the latter. Even if the party had sufficient capacity to contract, yet if, through trusting confidence, the other has led him into the illegal act, and then imposed upon him, such relief will not be refused.

In *Osborne v. Williams*, 18 Ves. 382, a father and son entered into a contract in violation of a statute. It had been executed by the son, and the father had derived a benefit therefrom. Both parties having died, the representatives of the son sued those of the father for an account, and relief was granted upon the ground that while the parties were *in delicto*, yet they were not *in pari delicto*.

In *Pinckston v. Brown*, 3 Jones Eq. 494, a mother, upon the advice of her son, executed a deed of trust for the payment of her debts, but which left out one of her creditors and secured several fictitious notes executed to the son, in whom she had implicit confidence; she having paid all of the *bona fide* indebtedness, the deed of trust was vacated at her instance, the court saying that "the mother and son were *in delicto*, but not *in pari delicto*."

See also the cases of *Boyd v. De la Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197; *Barnes v. Brown*, 32 Mich. 146; *O'Conner v. Ward*, 60 Miss. 1025; *Freelove v. Cole*, 41 Barb. 318; and *Anderson v. Merideth*, 82 Ky. 564, where it is held that if the mind of one of the actors in a fraud exercises an undue dominion over that of the other by reason either of physical or intellectual weakness, or from a confidence admitting of imposition, then the general rule that equity will not aid either party to it does not apply.

In the case now presented, the parties did not stand upon an equal footing. They were not dealing at arms'-length. The son had the confidence of his widowed mother. Such a relation existed as gave him special power over her; but the filial love due to her seems to have cringed to self-interest, and he is found practicing on the weakness and confidence of his aged mother. She was not in debt; no creditor was to be defrauded; and under the circumstances, the deed must be regarded as the creature of the false alarm of legal consequences in her mind, but of which he was the author, and is, therefore, his act, rather than that of the mother.

Judgment reversed, with directions to render a judgment annulling the deed of September 27, 1881, and directing a reconveyance to the appellant of the property described in it, and for further proceedings in harmony with this opinion.

RELIEF OF GRANTOR FROM A CONVEYANCE, THE OBJECT OF WHICH WAS TO EVADE SOME LAW, OR TO ACCOMPLISH SOME UNLAWFUL PURPOSE. — It is an established general principle, that as between parties *in pari delicto*, standing upon an equal footing, no relief will be given by the courts. In such a case, the parties will be left in the position where they have knowingly and willfully placed themselves: See *Boyd v. Barclay*, 1 Ala. 34; 34 Am. Dec. 762, and note 765; *Hooker v. De Palos*, 28 Ohio St. 251; *Kahn v. Walton*, Sup. Ct. Ohio, 1889; *Solinger v. Earle*, 82 N. Y. 393; *Harvey v. Varney*, 98 Mass. 118; *Booker v. Wingo*, Sup. Ct. S. C., 1888; *Shaw v. Carlile*, 65 Tenn. 594, 605; *Goudy v. Gebhart*, 1 Ohio St. 262; *Fletcher v. Fletcher*, 2 McAr. 38. But the rule is not one of universal application, and even where the parties are *in pari delicto*, the court may interfere and grant relief, where public policy requires its intervention, though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with the defendant. In such cases, the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public, the guilty party to whom relief is granted being only the instrument by which the public is served: See *Holman v. Johnson*, Cowp. 341; *Osborne v. Williams*, 18 Ves. 379; *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *W. v. B.*, 32 Beav. 574; *Clemens v. Clemens*, 28 Wis. 637; 9 Am. Rep. 520; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132, and note 153. And it is said that "courts are and should be cautious in affording relief to a fraudulent grantor, or other violator of the law under this

exception, and should act only where it is evident that some greater public good can be subserved by action than by inaction": Cooper, J., in *O'Conner v. Ward*, 60 Miss. 1025, 1037; and see *Renfrew v. McDonald*, 11 Hun, 254.

But unless the parties are strictly *in pari delicto* as well as *in delicto*, the courts are not disposed to apply the maxim rigidly. And where the party seeking relief is less to blame than the other, or if it appears that one party may have acted under circumstances of oppression, imposition, undue influence, or great inequality of condition, so that his guilt may be far less than that of his associate in the offense, the court will weigh the degrees of guilt, and afford relief to the more innocent party: *Roman v. Mali*, 42 Md. 513; *Anderson v. Merideth*, 82 Ky. 564; *Freelove v. Cole*, 41 Barb. 326; 41 N. Y. 619; *Harrington v. Grant*, 54 Vt. 236; *Poston v. Balch*, 69 Mo. 115. Recent decisions afford numerous illustrations of the application of this doctrine. Thus where a husband represented to his wife that she was liable for certain debts, for which in fact she was not liable, and that the creditors would take her property therefor, and in that belief, and with the purpose of defrauding such creditors, she transferred her property to her husband, the conveyance was set aside: *Boyd v. De la Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197. So where a mother was induced by the statements and persuasion of her daughter to believe that she was in danger of losing her land through litigation of her son's wife unless she conveyed it to her daughter, and she did convey it for the purpose of protecting it therefrom, such representations being untrue, and such apprehensions in fact groundless, the deed was set aside: *Kleeman v. Peltzer*, 17 Neb. 381; and see *Harrington v. Grant*, 54 Vt. 236. So of a conveyance, where the parties thereto were brothers, and the grantor was a cripple, weak in body and mind, and under the control of the grantee, by whom his fears were operated upon by making him believe that he was in danger of losing his property by reason of a threatened suit for breach of promise, for which there was no foundation in fact, and there was no consideration paid and none to be paid, and the conveyance was induced by the fears of the grantor and the promise of the grantee to reconvey the land: *Hollinway v. Hollinway*, 77 Mo. 392. So where a person who was ignorant and of weak intellect, under the influence and advice of another, executed to the latter a note and mortgage in fraud of his creditors and without consideration, it was held that he was not debarred from relief: *Davidson v. Carter*, 55 Iowa, 117. And the doctrine was asserted that where a stronger mind takes advantage of a weaker, and by persuasion and influence procures the unlawful act, the maxim *in pari delicto* ceases to be applicable: *Id.* 119. Where a conveyance, in fraud of creditors, was made to an attorney, in accordance with and pursuant to his advice, it was held that the grantor could recover back for his own use the property transferred, such a case constituting an exception to the general rule that the fraudulent grantor cannot undo, for his own benefit, the transfer he has made: *Ford v. Harrington*, 16 N. Y. 285; and see *Barnes v. Brown*, 32 Mich. 146. It is, however, held that if the parties to an illegal transaction are *in pari delicto*, the mere fact that at the time of such transaction the relation of attorney and client existed between them will give the latter no claim to the aid of a court of equity to have restored to him the property of which the former has become possessed by their joint fraud. The relation of attorney and client alone will not except the case from the general rule: *Roman v. Mali*, 42 Md. 513.

JAMES'S ADMINISTRATOR v. TRUSTEES OF HARRODSBURG.

[85 KENTUCKY, 191.]

CORPORATIONS. — FAILURE ON PART OF MUNICIPAL CORPORATION TO PROVIDE MEANS for abating a nuisance wholly on private property, and caused by the act of the owner alone, or the omission of its officers to abate the nuisance when the means are provided, gives no cause of action against the corporation to one who is injured by such neglect of duty.

Thomas C. Bell and Phil. B. Thompson, for the appellant.

O. S. Posten and R. P. Jacobs, for the appellees.

PRYOR, C. J. The appellant's intestate was seriously injured by a stone thrown by a blast of powder, that was made on the lot of one of the residents of the town, preparatory to the erection of a building upon it by the owner.

An action was instituted by the person injured against the town of Harrodsburg, in which, it is alleged that the excavation was made on the lot by the consent of the city, and the blasting of stone permitted for several days, the stones falling in the streets of the city, so as to endanger the lives of its citizens and those passing; and finally, one of the stones striking the plaintiff on the foot, crushing it, rendering him a cripple for life. It is alleged that the blasting, as it was conducted, was a nuisance, and so known to the officers of the city government, and they neglected to abate it, or take any steps for the protection of those passing against the danger. The plaintiff died, and the action is here in the name of his personal representative, who has appealed from a judgment sustaining a demurrer to the petition and dismissing the action.

It is not alleged that the nuisance was committed under or by the direction of the trustees of the town, or that the town had any interest in the lot or the excavation that was being made upon it. The lot formed no part of the public streets or alleys of the town, was not used as a park or pleasure-ground by the town, and the town was in no manner connected with the wrong, except in consenting to the erection of the building. It is not alleged that the building or excavation was a nuisance, or endangered the lives of the people, but it is averred only that the mode of blasting the rock, conducted by the owner, or those in his employ, was dangerous to the passers-by, and resulted in the injury complained of. The legislative power of the town may have authorized the abatement of nuisances,

and the imposition of penalties by the authorities on those who create a nuisance on their own lots, and yet we are aware of no rule that would make the town liable in a civil action for a failure to pass ordinances for the suppression of such nuisances, or to enforce these laws through the proper officers when enacted. The public streets of the town, under the immediate control of the trustees or the municipal authorities, must be kept unobstructed, and when an injury results to the citizen by reason of a neglect of duty in this regard by the proper authorities, a civil action may be maintained; and so of other property within the corporate limits and belonging to the corporation. Here an action is attempted to be maintained by a private citizen against the town because of the negligent conduct of the owner on his own lot in making an excavation by the use of powder that had become dangerous to the adjoining property, or to persons passing on the street adjacent.

The city might have notified the owner to cease blasting, but the failure of the owner to comply with the request would not make the city liable for failing to take such action as was necessary to abate the nuisance. The town may have had no ordinance on the subject, and the remedy, if adopted, not adequate to suppress the wrong; and still, for the failure of either legislative or judicial department of the town to perform its duty in this regard, no action would lie. The owner would be liable to an indictment at the instance of the public, and also to an action by the party receiving a private injury by reason of the wrong, but as to the town no liability would exist. The power of a town or city to suppress or abate a nuisance, like all other powers, is derived solely from the legislature; and that a town is responsible for not abating a nuisance, both to the public and to the private citizen who has received a special injury, may, as a general rule be conceded; but in all such cases the injury complained of must arise either from the neglect of the town in the attempt to discharge a public duty for the benefit of the public, such as improving its streets, digging its public wells, or erecting other public works, or in omitting to keep such improvements in a condition that protects the public or the private citizen from danger. In all such cases the town, if a nuisance is caused by the neglect of its officials, or by others on its public grounds, is answerable in damages, either to the state or the citizen, or both, when a special injury accrues to the latter.

The erection of improvements within a city being necessary, the work must be done in an ordinarily skillful manner, and if not, and an injury results to the citizens, the town will be responsible. But for neglecting, through its officers, to discharge certain official acts, that is, to abate a nuisance on private property caused by the act of the owner alone, no responsibility exists for a special injury.

In the case of *Davis v. City Council of Montgomery*, 51 Ala. 139, 23 Am. Rep. 545, the house of the plaintiff was burned down by sparks from a steam-engine used by the proprietors of an adjoining lot. Although the engine might have been abated as a nuisance under the city charter, and the authorities had been notified of the danger, it was held that no recovery could be had.

The doctrine contended for in this case is, that the town is bound to abate all nuisances within its limits, or be responsible in damages to those who may be injured thereby. This rule cannot apply to a municipal corporation. The power to abate a nuisance may be expressly given; but the failure to provide the means of removing the nuisance, or the omission of its officers to remove it when the means are provided, gives no cause of action to those who are injured by this neglect of duty. The party creating the nuisance is liable in a civil action, and may be indicted for the offense. The charter of a town or city usually gives it the power to open streets, alleys, etc., and to take control of and the custody of these streets, as well as the public buildings and public grounds; and therefore it becomes the duty of the authorities to remove nuisances, and to prevent all obstructions in its public thoroughfares calculated to endanger the lives of those who are upon them.

In the case of *Parker v. Mayor and Council of Macon*, 39 Ga. 729, 99 Am. Dec. 486, a dwelling had been destroyed by fire, leaving the walls of the building on the edge of the sidewalk. The wall was in such a condition as made it liable to fall at any moment, and injure those passing on the street. It did fall, and injured the plaintiff, who sued and recovered damages.

The result in that case was made to depend on the duty of the city to keep its sidewalks and streets in a condition of repair that would render them safe for those passing.

It was argued in that case that the wall was private property; but the court held that it was the duty of the city to remove anything hanging over the sidewalk which would

probably work an injury to those passing. That case was likened to the case of a pit dug at the edge of the street, with no protection to prevent those passing from falling or stepping over. Both were regarded as obstructions to the public way, and the city, having the control of the streets, like an individual, could not create the nuisance, and should not, by reason of its charter contract, neglect the important duty of keeping such a way safe for those passing over it. Here the stones constituted no obstruction to the street, although the lives of those passing were endangered. The city had neither the custody nor control of the private property, and is no more liable for the special injury than if sky-rockets, shot from the yard of the owner, had caused the town to burn up, or had injured those upon the streets; or, as in the case from Alabama, where the sparks from the engine had destroyed the house of a neighbor. There is a manifest distinction between the case before us and that of *Parker v. Mayor and Council of Macon, supra*. In the last-named case, the duty was imposed upon the party in possession, with the absolute control of the streets for the public use, of keeping them in repair; and it was as much its duty to remove the walls as it was to have taken the *débris* from the street after the fall. Its charter obligation bound it to discharge this duty. In the case before us, the town was empowered to legislate in regard to all nuisances, and the omission to provide a remedy against the owner of private property permitting the nuisance, or to execute an ordinance passed to prohibit such a nuisance, and to abate it, is made the foundation of the action. The failure to take legislative action, or to enforce the law when enacted by entering upon the private estate of the citizen and staying the manner of the execution of the owner's work upon it, gives no cause of action against the city. The failure to exercise that governmental power, whether legislative or judicial, is not within the class of cases or the rule by which the liability of the town is to be determined. The judgment below is therefore affirmed.

MUNICIPAL CORPORATION — LIABILITY FOR FAILURE TO REMOVE OR ABATE NUISANCE: *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681, 686, note; *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256.

MUNICIPAL CORPORATION IS LIABLE FOR INJURY caused by nuisance occasioned by backing of water by reason of sewer or culvert defectively constructed, which would not have occurred but for that cause, although plaintiff's cellar had been lowered by a prior owner: *Hutchins v. Mayor*, 68 Md. 100; 6 Am. St. Rep. 422.

KEMPER v. COMMONWEALTH.

[55 KENTUCKY, 219.]

CRIMINAL LAW. — PUNISHMENT IMPOSED BY CITY GOVERNMENT UPON OFFENDER FOR HAVING VIOLATED the police regulations of the city is no bar to a prosecution by the state for the same acts, when they also constitute an offense against the laws of the state. And the provision in the city charter which gives the city court exclusive jurisdiction of all offenses committed against the ordinances and by-laws of the city means that the jurisdiction of such court is exclusive, so far as the act constitutes an offense against the city.

W. T. Ellis, for the appellant.

P. W. Hardin, for the appellee.

BENNETT, J. The appellant was indicted, tried, and convicted in the Daviess circuit court for keeping and maintaining a bawdy-house in the city of Owensborough, Daviess County, Kentucky. Her fine was fixed by the jury at \$350. She pleaded in bar that she had been tried for the same offense and convicted of it in the city court of Owensborough, which court, under the city charter and by-laws, had jurisdiction to try the offense. The circuit court, regarding appellant's plea in bar as insufficient, overruled it, and rendered judgment against her for \$350,—the amount fixed by the jury. She has appealed to this court.

By the charter of the city of Owensborough, its mayor and common council are authorized to pass such ordinances as they may deem necessary and proper for the purpose of suppressing disorderly houses, bawdy-houses, etc., within the city limits, and to prescribe the punishment for the violation of such ordinances. Pursuant to this power, the mayor and common council passed an ordinance providing that any person or persons who shall, within the city of Owensborough, establish or carry on, or permit to be carried on, upon his or her property, any house of ill-fame, shall, upon conviction for each and every offense, be fined not less than twenty-five dollars nor more than one hundred dollars; that each twenty-four hours same is carried on, or permitted to be carried on, shall constitute a separate offense under this ordinance. The city charter also provides that the city court shall have exclusive jurisdiction of all actions and prosecutions for violations of the ordinances and by-laws of the city.

The question is, Was the appellant's trial and conviction in the city court of Owensborough, for having kept a bawdy-house

in the city, in violation of the city ordinance, a bar to a prosecution by the state for the same acts, which constituted an offense against the laws of the state?

The ordinances and by-laws of the city of Owensborough, which provide for the good order, peace, and morals of the city, are mere police regulations, and form no part of the criminal jurisprudence of the state. The state exercises its judicial power in criminal cases arising under the general criminal jurisdiction of the state, and where its peace, good order, and dignity are involved.

The power conferred upon the city of Owensborough by its charter, as well as the purpose of the ordinance passed pursuant to the charter, was to provide a mere police regulation for the enforcement of good morals — the suppression of bawdy-houses — within the city limits. The city did not attempt to punish the appellant for any offense committed against the laws of the state. It had no power to inflict such punishment. The offense for which she was punished was committed against the good order and public morals of the city. The offense committed by appellant against the city and the state, although consisting of the same act, are quite distinguishable, and the prosecution for each offense proceeds upon different grounds; that of the city proceeds upon the sole ground of punishing for violating the city ordinance, the state having no jurisdiction to prosecute and punish for the violation of the ordinance. The prosecution by the state proceeds upon the sole ground of punishing for violating its criminal laws, which are applicable alike in the whole state, and violators of them must be punished by the same general principle, the city, by virtue of its police regulations, having no jurisdiction to prosecute and punish persons for violating the criminal laws of the state.

The case at bar aptly illustrates these principles. The punishment prescribed by the city ordinance for keeping a bawdy-house within the city limits is a fine of not less than twenty-five dollars, and not more than one hundred dollars. The punishment for violating the state laws by keeping a bawdy-house is by fine or imprisonment, or both, at the discretion of the jury trying the case. So if the principle contended for by appellant prevailed, she, although violating the laws of the state as well as the police regulations of the city, could only be fined for keeping a bawdy-house within the city limits from twenty-five dollars to one hundred dollars, whilst

her neighbor, for keeping a bawdy-house just beyond the city limits, could be fined and imprisoned, at the discretion of the jury. Such a rule would be clearly wrong.

The truth is, that the appellant, by keeping a bawdy-house within the limits of the city of Owensborough, violated its police regulations, for which the city had the right to punish her, and did punish her. And by the same act she violated the criminal laws of the state. And each had the right to punish her without reference to the jurisdiction of the other; and the punishment inflicted upon appellant by the city government for violating its police regulation was no bar to the right of the state to punish her for violating the criminal laws of the state: See *Cooley on Constitutional Limitations*, 5th ed., 241; *Mayor etc. v. Allaire*, 14 Ala. 402; *Shafer v. Mumma*, 17 Md. 336; 79 Am. Dec. 656.

The provision in the city charter which gives the city court exclusive jurisdiction of all offenses committed against the ordinances and by-laws of the city speaks for itself. It means that the jurisdiction of the city court to try and punish all offenses against the police regulations of the city shall not be invaded by any other jurisdiction: See *Levy v. State*, 6 Ind. 284.

The judgment of the lower court is affirmed.

CRIMINAL LAW—DEFENSE OF FORMER ACQUITTAL OR CONVICTION: *Black v. State*, 36 Ga. 447; 91 Am. Dec. 772; *Dominick v. State*, 40 Ala. 680; 91 Am. Dec. 496; *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550; *Maher v. State*, 53 Ga. 448; 21 Am. Rep. 269; *State v. Littlefield*, 70 Me. 452; 35 Am. Rep. 335; *Wilcox v. State*, 6 Lea, 571; 40 Am. Rep. 53; *Curtis v. State*, 22 Tex. App. 227; 58 Am. Rep. 635.

WHEN ACT IS NOT PUNISHABLE UNDER GENERAL STATUTE after punishment under city ordinance: *Huffsmith v. People*, 8 Col. 175; 54 Am. Rep. 550. But compare *McRea v. Mayor*, 59 Ga. 168; 27 Am. Rep. 390.

HENDRICKSON v. COMMONWEALTH.

[85 KENTUCKY, 281.]

HOMICIDE — DEATH FROM EXPOSURE COMPELLED BY DEFENDANT — INSTRUCTIONS TO JURY. — On trial of indictment of husband for murder of wife, it appeared that they quarreled in the night-time, that the husband threatened to cut his wife's throat, and that thereupon she fled from the house and died from exposure. An instruction which authorized the jury to convict, "if they believed the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm at his hands," was properly given; but in this case, the accused being a cripple in one arm, and it appearing that the deceased, his wife, had the disposition and ability to fight with him, it was error not to permit the jury to inquire "whether or not such fear was well grounded or reasonable"; and the jury should have been further instructed "that, to convict, they must believe the death of the wife by exposure was the natural and probable consequence of leaving the house at the time and under the circumstances."

R. L. Ewell, for the appellant.

P. W. Hardin, attorney-general, for the appellee.

LEWIS, J. Under an indictment for the murder of his wife, appellant was convicted of manslaughter.

From the testimony of a daughter of the deceased, and step-daughter of appellant, the only person present at the time, it appears that a difficulty took place at their residence, at night, after they had retired to bed, in the winter of 1885-86, and, in the language of the witness, occurred as follows: "The sow rooted open the door of the cabin, and they [her mother and father] fell out over driving her out, and he choked, beat, scratched, and struck her, and she knocked him down with the iron shovel, and got on him, choked him, and asked him how he felt, and he started towards his breeches and said: 'If I had my knife,—I will get my knife and I'll cut your doggon'd throat'; and that she ran out at the door and did not return that night; that he shut the door after her and propped it with a stick of wood and went to bed." She further stated that, next morning, she went to look for her mother, and found her lying in the snow, dead, and when she started, appellant told her to take her mother's shoes and stockings.

The statement to the jury, made by appellant himself, is, that the deceased commenced the fight, getting him down on the floor, when he choked and bit her, and she then knocked him down with an iron shovel, and got on and choked him, and then jumped up and ran out of the door, saying she would have him arrested and put in jail. He, however, admits he

said to her that if he had his knife he would cut her, and started for his breeches.

From the testimony of a witness, it appears that the place where the deceased lay was within about one hundred yards of his house, and about half a mile of her residence, and that in going to the place where she was found, she had passed by the gate of another person, and within twenty feet of his house, which was two hundred and fifty yards nearer her own residence than was the place where she died. When found, she was lying on her face, dead, and badly frozen, the weather being extremely cold, and where she lay were signs of stirring in the snow, which was about eighteen inches deep. When she left her residence, she was barefooted, and had on very little clothing, and along the route she took, which led through briars, there were small quantities of blood and fragments of clothing that had been torn off by the briars; and at another place she had struck her ankle against the end of a log, and it bled freely. The witnesses testify that there were scratches on each side of her neck, and finger-prints on her throat, and prints of teeth on her left arm and back of her hands, and her legs from knees down were lacerated by the briars. According to the testimony of a physician, she was eight months and one week gone in pregnancy; but she had no wound, bruise, or other mark of violence that could have produced death. He also testified that appellant was badly crippled and paralyzed in one arm, and that on the day of his examining trial he had a considerable bruise about his face, and a bad-looking one about the eye.

There is evidence that the deceased was a high-tempered woman, hard to get along with. She told a witness of fighting and whipping her husband, who was a cripple, and had but one arm he could use, though the daughter testifies that in their fights he whipped her. It further appears that she had on other occasions ran off and left her husband, and at one time she came to the house of a witness, and staid all night, leaving a young baby with her husband, saying to the witness that she had got mad and run off.

The lower court refused to instruct the jury, at the instance of appellant's counsel, that before finding him guilty they must believe the death of his wife was produced by him alone, and in no other way; and also refused to instruct that, in order to convict, they must believe he intentionally exposed her, or forced her to expose herself, to the cold, under such circum-

stances that her death would be the probable and natural consequence of such exposure, and that she died from such exposure; but, in lieu of those asked by his counsel, gave the following: "If the jury believe . . . that the defendant, . . . in sudden heat and passion, and not in his necessary or reasonably necessary self-defense, used such force and violence towards his wife as to cause her to leave his house from fear of death or great bodily harm at his hands, and, from exposure to cold, her death was produced by the said act of the defendant, they should find him guilty of manslaughter," etc.

"Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act; and it is not material whether the force be applied to the body or to the mind; but if it were the latter, it must be shown there was the apprehension of immediate violence, and well grounded from the circumstances by which the deceased was surrounded; and it need not appear that there was no other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take": Russell on Crimes, 489; 3 Greenl. Ev., sec. 142.

In a case where the evidence was that the defendant, a husband, beat his wife and threatened to throw her out of the window, and to murder her, and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruises received by the fall she died, it was held that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall as much as if he had thrown her out of the window himself. And in another case, where the deceased, from a well-grounded apprehension of a further attack which would have endangered his life, endeavored to escape, and in so doing was fatally injured from another cause, it was held murder: See Wharton on Homicide, sec. 374, where these and other cases are cited.

The case of *State v. Preslar*, 3 Jones, 451, was where, after the husband had desisted from beating his wife, she went off a little distance in the yard and sat down, and the husband, after about five minutes, went into the house and laid upon the bed with his clothes on, and about half an hour

afterwards she started, in company with her son, to the house of her father, about two miles off; but when she got within two hundred yards of her father's house, she said she did not wish to go there until morning, it being in the night-time, and laid down on a bed-quilt, in the woods. Early next morning she gave notice to the inmates of the house of her presence, but was not able to walk there, and the next day died. In that case the court decided that as she had exposed herself thus without necessity, and there were, besides, circumstances showing deliberation in leaving her home, the husband could not be held responsible to the extent of forfeiting his life. But the court at the same time said, that "if, to avoid the rage of a brutal husband, a wife is compelled to expose herself by wading through a swamp or jumping into a river, the husband is responsible for the consequences."

The question before us is, whether, tested by the principles stated and illustrated, the instruction quoted correctly and fully embodies the law applicable to this case.

It will be perceived that the jury were authorized by the instruction to convict, if they believed the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm at his hands. But they were not instructed, as they should have been, before convicting, to believe, nor permitted to inquire, whether or not such fear was well grounded or reasonable. The jury might, and from their verdict doubtless did, believe she left the house from fear of death or great bodily harm, yet, if they had taken into consideration the previous conduct of the deceased, her disposition and ability to fight with her husband, their comparative physical powers, and all the circumstances proved in the case, they might not have believed her fear was well grounded or reasonable, and unless it was, the accused should not be held responsible for her death, for in such case he could not be regarded as forcing her to leave the house.

The jury should have been further instructed that, to convict, they must believe the death of the wife by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances.

There is no evidence the accused prevented her re-entrance into the house, as assumed in the instruction in regard to murder, and it was error to make reference thereto. For the errors indicated, the judgment is reversed for a new trial, and other proceedings consistent with this opinion

CRIMINAL LAW—INSTRUCTIONS TO JURY, FORM OF, ETC.: *People v. Levison*, 16 Cal. 98; 76 Am. Dec. 505; *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269; *People v. King*, 27 Cal. 507; 87 Am. Dec. 95. The defendant in a criminal prosecution is entitled to have propositions of law governing his case plainly stated to the jury, in such a manner as to enable them to comprehend the principles involved: *Lancaster v. State*, 3 Cold. 340; 91 Am. Dec. 253.

LOUISVILLE AND NASHVILLE R. R. CO. v. BALLARD.

[85 KENTUCKY, 307.]

RAILROADS. — OFFICERS OF RAILROAD TRAIN, AS TO PASSENGERS IN TRANSITU, ARE TO BE CONSIDERED as the corporation itself, and it is therefore as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it.

RAILROAD COMPANY IS LIABLE FOR EXEMPLARY DAMAGES IN CASE OF INJURY TO PASSENGER resulting from a violation of duty by one of its employees in the conduct of the train, if such violation of duty be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences. As to female passengers, their contract of passage embraces an implied stipulation that the company will protect them against general obscenity, immodest conduct, or wanton approach. But "indecorous" conduct alone, even toward a female passenger, is insufficient to authorize exemplary damages.

EVIDENCE. — ANY CIRCUMSTANCE ATTENDING COMMISSION OF TRESPASS or wrong, although not set forth in the declaration, may be given in evidence with a view of affecting the question of damages, save where the circumstances within themselves constitute an independent cause of action.

William Lindsay, and Rountree and Lisle, for the appellant.

Hill and Rives, for the appellee.

HOLT, J. The appellee, Lou. E. Ballard, after purchasing a proper ticket, took passage from one intermediate station to another upon a passenger train of the Louisville and Nashville railroad. It failed to stop at the platform at her place of destination, which was a flag-station. It was a down grade at that point, and there is some evidence tending to show that the car-brakes did not operate well, in consequence of which the train ran some fifty or sixty yards beyond the platform, where it was stopped, and the station then announced by the proper person; but the appellee did not get off the train. Upon the other hand, there is testimony tending to show that this stop was not made, and that no effort was made to stop the train until it was done at the request of the appellee, at a point

between her destination and the next station. The weight of the evidence shows that the conductor then informed her that she could either go on to the next station, or he would stop the train, and she could get off there; and that upon his so telling her the second time, he did stop it, and she got off at that point, which was a lonely place, and about a mile beyond her station. She said that the conductor "seemed very impatient, and his tone was rather rough for a gentleman"; that he did not assist her in getting off with her baggage, which consisted of a valise and bundle, and that as she jumped from the lower step of the platform to the ground he stood upon the platform, while a brakeman of the train, who was standing by, looked at her and "grinned."

Upon the other hand, there is evidence to the effect that the conductor did assist her out of the car, and was altogether kind and polite in his manner. There was no request upon her part that the train should be backed to her station; but this should have been done under the circumstances. The appellee was compelled to walk back to her station, and from thence three quarters of a mile to her home; in consequence of which she was confined to her bed the most of the time for three or four days, and unable to teach her school for a week.

The jury in this action by her for damages returned a verdict for three thousand dollars.

Manifestly, it cannot be sustained upon the ground that it did not include exemplary damages, and was compensatory only for the breach of the contract for transportation.

If upheld, it must be upon the ground that she was entitled to exemplary damages, and that this question was submitted to the jury by proper instructions. They were told, "if the jury believe from the evidence that the defendant's agents or employees, or any of them, in charge of defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone, or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding five thousand dollars, the amount claimed in the petition."

A corporation can act only through natural persons. It, of necessity, commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad, the safety and comfort of passengers is necessarily committed to them. They act for it. Its entire power, *pro hac vice*, is

vested in them, and as to passengers *in transitu*, they should be considered as the corporation itself. It is, therefore, as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it.

Public interests require this rule. They also demand that the corporation should be, and it is, liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences: *Dawson v. Louisville etc. R. R. Co.*, 6 Ky. 668.

As to female passengers, the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach: *Commonwealth v. Power*, 7 Met. 596; 41 Am. Dec. 465; *Croaker v. Chicago etc. R'y Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Nieto v. Clark*, 1 Cliff. 145; *Chamberlain v. Chandler*, 3 Mason, 242.

It was improper, however, to instruct the jury, as was in effect done in this instance, that "indecorous" conduct alone is sufficient to authorize exemplary damages. The term is too broad. It may embrace conduct which would not authorize their infliction.

It is true that the peculiar element which, entering into the commission of wrongful acts, justifies the imposition of such damages cannot be so definitely defined, perhaps, as to meet every case that may arise. It has been said that they are allowable where the wrongful act has been accompanied with "circumstances of aggravation": *Chiles v. Drake*, 2 Met. 146; 74 Am. Dec. 406; or if a trespass be "committed in a high-handed and threatening manner": *Jennings v. Maddox*, 8 B. Mon. 430; or where the tort is "accompanied by oppression, fraud, malice, or negligence so great as to raise a presumption of malice": *Parker v. Jenkins*, 3 Bush, 587; or, as was said in *Dawson v. Louisville etc. R. R. Co.*, *supra*, where the wrongful act is accompanied by "insult, indignity, oppression, or inhumanity."

It would, however, be extending the rule unwarrantably to hold that they could be imposed, provided the conduct was merely "indecorous." This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the

slightest departure from the most polished politeness to conduct which is vulgar and insulting.

It does not necessarily, or indeed generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered; while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

In the case now under consideration, the jury may have believed it was indecorous in the conductor not to stop the train at the platform; or not to carry her valise for her when she was leaving the train; or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next one; or in merely telling her that she could walk back to her station,—yet none of these things amounted to “insult, indignity, oppression, or inhumanity.”

The lower court properly refused the request as made for special findings. The interrogatories offered merely required the jury to say what amount they found as compensatory and what sum as exemplary damages. They involved mixed questions of law and of fact.

Upon a retrial, the question of limiting the finding to compensatory damages should be presented to the jury under proper instructions, and the difference between them and those which are exemplary defined.

The evidence as to the conduct of the brakeman was competent. It is true that it was not specifically complained of in the petition, but only that of the conductor. The brakeman was, however, one of the agents of the railroad company in the management of the train upon which the appellee was a passenger. It is not necessary that a petition should enumerate specifically that this or that person connected with the management of the train was guilty of improper conduct in order to authorize the admission of evidence as to this or that particular party. It is sufficient to aver the breach of duty upon the part of those in control of the train. Beside, in this instance, the conduct of the brakeman complained of was in the immediate presence of the conductor, and occurred at the time of the other alleged acts of which the appellee complains. We do not mean to say whether he was guilty of improper conduct or not; but it was a part of the *res gestæ*, and therefore admissible. Any circumstances attending the commission

of a trespass or a wrong, although not set forth in the declaration, may be given in evidence, with a view of affecting the question of damages, save where they within themselves constitute an independent cause of action: Sedgwick on Measure of Damages, 538, note 3.

For the reason indicated, the judgment below is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

CONDUCTOR, IN LINE OF HIS DUTY IN COLLECTING FARE, taking up tickets, and in giving information to passengers on his train, represents the railroad company only as to the running and operation of his own train: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780. And his duty ceases when he has given his passengers safe carriage to their point of destination, announced the train's arrival at the station, and afforded them a reasonable opportunity to leave the cars: *Hurt v. St. Louis etc. R. R. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374; *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144; *C. O. & S. R. R. Co. v. Wills*, 85 Tenn. 613; *Raten v. C. I. R'y Co.*, 74 Iowa, 732.

LIABILITY OF RAILROAD COMPANY FOR EXEMPLARY DAMAGES to person injured by wrongful or negligent act of conductor of train: *International etc. R. R. Co. v. Wilkes*, 68 Tex. 617; 2 Am. St. Rep. 515; and see *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400; 99 Am. Dec. 282, 289, note; *Cincinnati etc. R. R. Co. v. Carper*, 112 Ind. 26; 2 Am. St. Rep. 144, and note 154; *Forsee v. Alabama etc. R. R. Co.*, 63 Miss. 66; 56 Am. Rep. 801; *Kuhn v. Chicago etc. R. R. Co.*, 74 Iowa, 137.

AVERY v. MEIKLE.

[85 KENTUCKY, 435.]

TRADE-MARKS. — TO CONSTITUTE VIOLATION OF RIGHT OF PROPERTY IN

TRADE-MARK, it is not necessary that the trade-mark itself should be imitated. If the simulation in every other respect be such as to destroy the efficacy of the trade-mark, and induce the public to believe that the manufactured article is that of the real owner of the trade-mark, it becomes as much a violation of property as if the trade-mark itself had been used.

TRADE-MARKS. — WHERE ONE'S RIGHT OF PROPERTY IN TRADE-MARK HAS BEEN VIOLATED, HE MAY ELECT to claim damages, or require the wrongdoer to account for profits. And the fact that the injured party, in an action in equity to restrain the wrongdoer, claimed "damages" will not preclude him from electing to take the "profits," which is the true criterion of damages in equity, no other special injury being alleged or claimed; nor will the plaintiff in such action be required to show affirmatively the extent of his injury, but the court will assume as matter of law that those purchasing the simulated goods would have been the customers of the plaintiff but for the simulation.

TRADE-MARKS. — LACHES IN PROSECUTION OF CLAIM FOR PROFITS not such as to preclude relief under the circumstances of the particular case.

W. O. and J. L. Dodd, John M. Brown, Hargis and Eastin, and Muir and Heyman, for the appellants.

James S. Pirtle, William Lindsay, and George M. Davie, for the appellees.

PRYOR, C. J. The original action was instituted in the court below by the present appellants, and an injunction obtained, restraining the appellees from the use of appellants' trade-mark upon certain plows, and to prevent them (the appellees) from selling their plows as the plows of the appellants. The chancellor below having denied the relief, his judgment was reversed, this court, upon the hearing, holding that while the appellees had not used the trade-mark proper of the appellants, they had so arranged or placed the letters and numerals used by the appellants on their plows, the plows of the appellees, and with the same coloring and staining had so simulated their manufacture as to cause their plows to be taken and sold as those made by the appellants, and that an intentional violation of the latter's right of property was in this way made to deceive the public, and to enable the appellees to sell their manufactures as those of the Averys, the appellants.

This court said: "By skillful combination of legal particles, taken one at a time, and in the aggregate leaving the mere trade-mark untouched, they have so confused its force and effect as to destroy its office and real efficiency to distinguish appellants' plows from all others": *Avery v. Meikle*, 81 Ky. 113.

The right of the appellants to an injunction was finally determined, and the case remanded for further proceedings.

On the return of the case to the lower court, the appellants asked for a reference to the commissioner, with directions to hear proof, and state an account of damages between the parties by reason of the wrongful acts of the appellees; that the appellees be compelled to state the number of plows that had been thus simulated by them that were sold, and the profits made on the sales, and that they be compelled to produce their books, etc.

The court declined to make such an order, and the case having been transferred to the law and equity court, that court refused to instruct the commissioner to report what profits the defendants (appellees) had made, but held that as the infringement of the property right had been committed by other means

than the appropriation of the trade-mark itself, it was essential in equity as well as at law to show the fraudulent intent, and therefore the profits made by the appellees should not be the measure of damages, but the actual injury sustained by the appellants.

Under this view of the law as held by the chancellor, and followed by the commissioner, the appellants were only entitled to recover where the proof showed that the plows of Meikle & Co. had been actually sold as the plows of the Averys, and their being a failure in this respect, the damages were merely nominal, and no recovery except for nominal damages was allowed.

The appellants maintain, as this court had determined that the simulation was intentional, the wrongful appropriation of this property right of the appellants was consummated when their plows were sold by the appellees or their agents, and the profits realized constituted the criterion of damages in equity, when no special damage was alleged or claimed by the appellants; while, on the other hand, the appellees insist that it was a mere tort, and the inquiry is limited to cases where the appellees have, in selling their plows, represented them in fact to be the plows of Avery. This is the real and only issue involved in the appeal.

We do not understand that, in order to constitute a violation of the right of property in a trade-mark, it is necessary the trade-mark itself should be imitated; but where the simulation in every other respect is so made as to destroy the efficacy of the trade-mark, and to deceive and induce others to believe that the manufactured article is that of the real owner of the trade-mark, it then becomes as much a violation of the right of property as if the trade-mark itself had been appropriated. Such was the decision in this case on the former appeal; and the intention on the part of the appellees in violating this right of the appellants was then finally determined. The fraudulent intent with which the simulation was made having been already adjudged, it was not necessary, on the return of the case to the lower court, for the commissioner, under an order of reference, to hear, or the appellants to offer, proof on that subject; but a simple reference to the commissioner to state an account of the profits upon proof adduced, which, when correctly ascertained, would give to the appellants all the relief to which they were entitled.

In compliance with this order, the commissioner could call

on the appellees to disclose the number of plows sold and the profits made, or appellants could establish the profits, if any, in some other mode. To require the appellants to show an actual fraudulent representation made by the appellees to those who purchased their plows would be impracticable, and result in permitting the wrong-doer to appropriate the property of another to his own use without rendering an account, as he would scarcely say to the purchaser, These plows I am selling were made by the Averys. The law makes this representation for him when he has imitated the manufactured article that he is selling so as to destroy the trade-mark, and enable him to sell it as the product of another.

While the profits made by the wrong-doer are not, in a technical legal sense, to be termed damages, still many of the text-books, as well as some of the reported cases, in fixing the measure of damages in a court of equity in a case like this, say that the plaintiff is entitled to the profits, but not so at law; he may there recover more or he may recover less than the profits realized. The fraud does not prevent a recovery of the profits in equity, as the plaintiff may not ask for more or be satisfied with less. Mr. Upton, in his work on trade-marks, in discussing the rights of the plaintiff in a case like this, says: "It is a violation of the right of property in a trade-mark, which, upon the principles established as the basis of the protection which the law extends to such property, will be suppressed by the extraordinary powers of a court of equity, and its fruits intercepted and restored": Page 214. An example is given in this work of a case analogous in almost every feature to the one before us, where, to use the language of the author, "an elaborate simulation had been made, not to communicate the truth, but to escape the penalty of a falsehood."

In appropriating this trade-mark by such a close imitation as to render it difficult for an ordinary observer to distinguish the one plow from the other, and then disposing of the plows to the public, the appellees, according to a well-settled rule of equity, have applied the profits to their own use that justly belonged to the appellants, and it is not necessary to inquire, nor will the chancellor stop to inquire, whether or not the appellants could have sold their plows to the same parties. The trade-mark is his property, the manufacture the result of his skill, and when one undertakes by coloring, painting, and so arranging his manufacture as enables him to virtually

destroy the trade-mark of another, and to sell his own as the product of the skill of the real inventor, it is as much a violation of the right of property in the trade-mark as if the trade-mark itself had been used. The appellants' trade-mark is a Maltese cross, with the name or letters "A. V. E. R. Y." distributed in its arms and center. It is not pretended that this trade-mark appeared on the plows made and sold by the appellees; but the imitation in every other respect is complete, and, as was heretofore decided, made with the intent to invade the right of property in the trade-mark of the appellants. If so, the appellants are entitled to an account of profits. It has, in effect, destroyed the trade-mark, and enabled the one to sell his plows as the manufacture of the other.

This is not an action for damages by the Averys against Meikle & Co. by reason of the latter selling their plows as the plows of Averys. If so, the ordinary rule in regard to the measure of damages resulting from the tort would apply. It is an action in equity to restrain the appellees from the use of appellants' trade-mark, and from making and selling plows which by certain devices and colorable imitation have been made to represent the plows of Avery & Co., and thereby destroyed their trade-mark or the right of property in it. It is a matter of doubt whether the averments contained in their equitable action are sufficient to make it a good petition at law as an action on the case, the prime object being the injunction to prevent the wrong; and when having the jurisdiction, the chancellor will order an account of profits. The rule as to the measure of damages, or the relief to which the plaintiff is ordinarily entitled in such a case as this when in a court of equity, is to give as damages the amount of profits the defendant made by reason of his wrong. The rule generally recognized as the true one is to give as damages the amount of profits the defendant shall have made by the infringement: *Browne on Trade-marks*, sec. 507.

In this case it has been adjudged that the imitation was made with the design on the part of the appellees to make profit by the deception, and we perceive no reason why the appellants should not have the profits, if they claim nothing more. This court cannot now, if so disposed, reconsider the question heretofore determined by requiring the plaintiffs to establish a deception that has already been adjudged to exist. In equity the wrong-doer is treated as a trustee in respect to the property, and is considered as holding the profits for the

rightful owner. This rule applies as to patents, and the elementary authors on the subject say: "In trade-mark cases, the rule is much the same, but in the latter, considerations are involved which do not enter into ordinary patent infringements; as, for example, loss of reputation, so that courts allow greater scope in ascertaining damages": Browne on Trade-marks. "In equity," says Mr. Sutherland in his work on damages, "where there is ground for invoking its jurisdiction, and an infringement has been found and decreed, and there has been no unreasonable delay in commencing suit, an account of profits will be decreed, which means the net profits the infringer has actually realized": Vol. 3, p. 631. Mr. Upton on Trade-marks says: "The order usually made by courts of chancery that the defendant keep an account of the sales made by him, to the end that he pay over to the plaintiff the profits resulting from such sales, would seem to indicate a rule": Page 245. While this author questions the wisdom of the rule, he substitutes no other for the guidance of the chancellor; and certainly, where the intention to violate appears, and the party charged is acting *mala fides*, he should not be heard to object to an account of profits. The supreme court in the case of *Root v. Railway Co.*, 105 U. S. 189, said: "When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid a multiplicity of suits, and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but by requiring an account of profits, on the ground that if any had been made, it was equitable to require the wrong-doer to refund them, as it would be inequitable that he should make a profit out of his own wrong."

In the same case citations are made from the opinions of Vice-Chancellor Wigram in *Colburn v. Simms*, 2 Hare, 543, and of Sir J. Leach in *Baily v. Taylor*, 1 Russ. & M. 73. In *Colburn v. Simms*, *supra*, it is said: "The court does not accurately measure the damage, but, as the nearest approximation it can make to justice, takes from the wrong-doer all the profits he has made by his piracy, and gives them to the party who has been wronged."

In *Baily v. Taylor*, *supra*, the ground for relief is laid down by the master of the rolls as follows: "The court [alluding to a court of equity] has no jurisdiction to give to the plaintiff a

remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in case of any other injury to his property, must be at law. Unless that primary right to an injunction exists, this court has no jurisdiction with reference to a mere question of damages."

In the case of *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639, the question as to the measure of damages was carefully considered, and hence has become a leading case. It was there argued that the entire profit should not be held to have originated from the wrongful use of the trade-mark, but that the intrinsic value of the article sold should enter into the question of value, and thereby lessen the profits. The court, in response, said: "Every consideration of reason, justice, and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from liability for the profit he has made by the use of the trade-mark, on the plea that it is impossible to determine how much of the profit is due to the trade-mark, and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit renders it just that he should lose the whole."

The case of *Leather Co. v. Hirschfeld*, L. R. 1 Eq. 299, claimed by counsel for the appellees to be analogous to this case, was where the plaintiff sued in equity, as here, but elected not to take an account of the profits to which, by the decision in that case, he was entitled, but elected to claim damages by reason of the invasion of his right; and having done so, it was held that the burden was on him to show the extent of his injury, and the court would not assume as a matter of law that those purchasing of the defendant the simulated goods would have been the customers of the plaintiff.

The appellants in this case did elect to have an account of profits, and asked for a reference that such an account might be taken. The fact that they claimed damages did not preclude them from electing to take the profits. This was, in fact, the true criterion of damages in equity, where no other special injury was alleged or claimed. In fact, the cases of *Neilson v. Betts*, L. R. 5 H. L. 1, and *De Vitre v. Betts*, L. R. 6 H. L. 319, referred to by counsel, establish the rule that

there cannot be an inquiry as to damages and also an account of profits. The plaintiff is not entitled, as said in those cases, "to an account of profits and also an inquiry as to damages. That principle applies generally, and without any distinction at all. It applies to every case of infringement, and therefore it must be taken to have settled conclusively that point, that the patentee must, in all these cases, when he has a decree, elect whether he will have an account of profits or an inquiry as to damages. He cannot have both."

In this case, the chancellor refused to permit the plaintiffs to elect, but compelled an inquiry as to the entire damage the plaintiff had sustained when he was not asking for it. It is true, the appellants asked for damages in their equitable action, but this did not confine them to such damages as a jury could give in an ordinary action for fraud. The chancellor should have said, All I can give you in the way of compensation is an account of profits. You may elect to claim such damages as you have sustained, or take an account of profits. The plaintiffs asked for an account of profits. They claimed nothing more. We have found no case, and been cited to no authority, where there has been a violation of the trade-mark, and an injunction granted, where the party wronged has been refused an account of profits, unless he had first elected to claim the actual damages he had sustained, or delayed the assertion of his claim. In the case of *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, a case, however, unlike this, the plaintiff declined to take an account of profits.

In an action at law, the measure of damages would be as insisted on by counsel for the appellees, and the authorities adduced in support of their views all conduce to sustain the jurisdiction of a court of equity, and the right of the appellants to an account of profits.

The plaintiff here had obtained his judgment or decree restraining the defendant from a further invasion of his right. It was adjudged that he had violated the rights of the plaintiff by appropriating his right of property to his own use, and the only question left for future consideration was the damages sustained. The plaintiff says, My damages in the forum I have elected, to grant the relief sought, is the net profits the appellees have realized by reason of their wrong. To these profits he is entitled.

This is the doctrine of the text-books, and approved by the reported cases referred to by counsel on either side: "The net

profits may be recovered, in equity, as profits made by the use of the plaintiffs' property, and the defendant, as a constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiffs' loss, and not the defendants' gain": 3 Sutherland on Damages, p. 631.

The rule laid down by Sutherland, and clearly stated, is the correct doctrine as to the criterion of damages, and while that general rule may not be applied to every case where there is an intentional appropriation by the one of the other's property by the use of the latter's trade-mark, or so simulating the manufacture of one as to make it resemble that of the other, so as to destroy the property in the trade-mark, we perceive no reason for denying an account of profits. The aid of a court of equity has been invoked to prevent the further appropriation of the plaintiffs' right of property to the use of the defendants. That relief has been granted, and the chancellor, at the instance of the plaintiff, will require the trustee to settle his accounts and account for the profits. The defendants occupy, in fact, the relation of trustees to the plaintiffs. The latter are the beneficiaries.

It is this principle, long recognized by courts of equity, that enables the chancellor to adjust the accounts between the parties, and give to the complainant that character of relief that he could not obtain in a common-law court.

It is also urged by counsel for the appellees that the appellants have been guilty of such laches in the prosecution of their claim for profits as precludes the chancellor from giving any such relief. The imitation in this case began first in the month of November, 1878, but was not made complete until some time in 1879; then the precise similitude appeared, and in some five or six months thereafter this action was instituted. So there was no laches on the part of the appellants, and would have been none if the similitude had been complete in the month of November, 1878, for then only fourteen months would have elapsed between the commission of the wrong in the first place and the bringing of the action.

Whether a lapse of time of less than five years would constitute a bar to the recovery of profits in equity is not necessary to be decided. There might be such an acquiescence on the part of the plaintiff as would amount to consent or work an equitable estoppel, but we find no such case presented by this record.

This case should, therefore, go to the commissioner, with direction to ascertain the number of simulated plows sold by the appellees from the time the simulation become complete, which was in the beginning of the fall of 1879, and the amount realized for them; the actual cost of the material used in the manufacture; the cost, which includes the hire of the employees in making the plows, allowing the use of the value of the tools, machinery, power, and other facilities necessary for the manufacture; expenses of selling and advertising; the value of the labor and superintendence of the work by the appellees themselves. These items deducted from the amount realized from the sales will leave the net profits, if any. If no profits, the damages are nominal only, as an election to take the profits has been made.

In some instances interest has been allowed on the profits to the plaintiffs, but there are facts and circumstances existing in this case that authorize the chancellor to withhold interest, if such is to be regarded as the general rule.

For the reasons indicated, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

IN PROCEEDING TO ENJOIN USE OF TRADE-MARK, QUESTION IS, whether the defendant's symbol or device is calculated to deceive and mislead the public; and if so, it is immaterial that he had no intention or thought of fraud, so far as the law of the case is concerned: *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676; and see cases collected in note 681, relating to subject of trade-mark law generally: *Parlett v. Guggenheimer*, 67 Ind. 542.

NUMBERS AS TRADE-MARKS: *A. S. L. Button Co. v. Anthony*, 15 R. I. 328; 2 Am. St. Rep. 898.

IDENTICAL NAMES AS TRADE-MARKS: *Rogers Mfg. Co. v. Simpson*, 54 Conn. 527.

GREER v. WINTERSMITH.

[85 KENTUCKY, 516.]

EXECUTION SALE. — THERE IS NO WARRANTY OF TITLE BY SHERIFF at an execution sale. The purchaser takes just what title the defendant in the execution has, and buys at his peril. The rule of *caveat emptor* applies to him.

SHERIFF'S DEED TO PURCHASER AT EXECUTION SALE TRANSFERS all the title which the defendant held when the execution lien attached, and takes precedence over subsequent liens and transfers. To this extent the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created. The fact that the purchaser at a second sale, under another execution against the same defendant, first obtained a deed gives him no advantage.

EXECUTION SALE, PRESUMPTION IN FAVOR OF. — Officer having sold land under execution, law presumes, in the absence of all testimony to the contrary, that he did his duty by levying the execution while in full force, and the silence of his return upon that subject is not sufficient to repel the presumption.

EXECUTION SALE — WAIVER OF LEVY AND ADVERTISEMENT. — Defendant in execution may waive levy upon the property and an advertisement of it by the sheriff, and such waiver will estop him from objecting to the sale, and from setting it aside after it has been made.

LAW OF CHAMPERTY DOES NOT APPLY to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed was made, and this rule applies to an executory verbal contract of sale.

PRINCIPAL AND SURETY. — WHERE SURETY'S LAND IS LEVIED ON AND SOLD UNDER EXECUTION against principal and surety, and the principal buys the land, his purchase inures to the surety's benefit, since it was the principal's duty to discharge the execution.

W. P. D. Bush and J. P. Hobson, for the appellants.

Montgomery and Posten, for the appellee.

BENNETT, J. Charlton D. Shean was the owner and in the possession of two tracts of land in Hardin County, Kentucky, one known as the Pearman tract, situated on the old road, about one mile from West Point, containing about one hundred and thirty acres; the other, known as the Carrico tract, situated on the turnpike, about four and a half miles from West Point. About one hundred acres of this tract were on the west side of the turnpike.

While an execution which issued from the Hardin circuit court against Charlton D. Shean was in the hands of the sheriff of that county for collection, and which was in full force, said Shean surrendered sixty acres of the Pearman tract of land to the sheriff to sell for the purpose of satisfying said execution. The surrender of said land was evidenced by a written indorsement on the execution as follows:—

"I give up to the sheriff of Hardin County to sell, to satisfy this execution, sixty acres of land at the southwest corner of my tract of land, on the old road, about one mile from West Point, known as the Pearman tract, and agree that he may sell without advertising.

"May 21, 1863.

C. D. SHEAN."

At the same time, the sheriff held another execution against Charlton D. Shean for collection, which issued from the Hardin circuit court, and said Shean surrendered to the sheriff one hundred acres of the Carrico tract of land to sell, for the pur-

pose of satisfying said execution. The surrender was by written indorsement on the execution, as follows:—

“I give up to the sheriff of Hardin County one hundred acres of land lying on the west side of the turnpike, and in Hardin County, about four and a half miles from West Point, to be sold to satisfy this execution, and agree that it may be sold without advertising

“May 21, 1863.

C. D. SHEAN.”

The sheriff's written indorsements on these executions show that, after having these two parcels of land appraised by two disinterested housekeepers of the county, he sold, at public outcry, the two parcels of land, at the court-house door in Elizabethtown, on the eighth day of June, 1863, and that Charles Greer, the father of the appellants, became the purchaser of both parcels at a less price than two thirds of their appraised value.

Several years after the purchase, Charles Greer died intestate; and no one having redeemed said parcels of land, the sheriff of Hardin County, on the second day of July, 1877, conveyed by deed said two parcels of land to the children of Charles Greer. They, after said conveyance, instituted two actions of ejectment,—one against Charles G. Wintersmith and others, for the purpose of recovering the sixty-acre tract of land, and the other against William Grimes and others, for the purpose of recovering the one-hundred-acre tract of land. The issues having been made up in each case, they were transferred to the equity side of the docket, and consolidated. The lower court, upon final hearing of the cases, dismissed them absolutely. The appellants have appealed to this court.

At the time Charlton D. Shean surrendered said parcels of land to the sheriff to be sold to satisfy said executions, he was the owner and in the possession of both parcels; therefore they were subject to levy and sale to satisfy said executions.

The contention of the appellees, Wintersmith and others, as to the sixty-acre tract of land, is, first, that the appellee, Wintersmith, purchased said tract of land at a sale made by the sheriff of Hardin County, Kentucky, by virtue of an execution which issued from the Hardin circuit court in his favor, and against Charlton D. Shean, and that he received a deed from the sheriff for said land in 1872, whereby he obtained a title to said land superior to that of the appellants.

This contention cannot be sustained; because,—1. The levy of Wintersmith's execution upon this land, and the sale

thereof, occurred in the summer of 1863, and after the land had been surrendered by Shean to the sheriff, and the sale thereof, to satisfy the other execution. And it is well settled that "execution liens attach to the defendant's real, instead of his apparent, interest in property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale": Freeman on Executions, sec. 335.

"Sales under execution always assume to be of all the title and interest of the defendant in the writ." Nothing more nor less than the defendant's title or interest in the property is presumed to be sold. That title or interest the purchaser gets. If it turns out that the defendant has no title or interest in the property sold, then the purchaser acquires nothing by his purchase. There is no warranty of title by the sheriff at an execution sale. The purchaser takes just what title the defendant in the execution has. He buys at his peril. The rule of *caveat emptor* applies to him: Freeman on Executions, sec. 301.

The land having been surrendered by Shean to the sheriff on the 21st of May, 1863, and a sale thereof having been made by the sheriff on the 8th of June, 1863, to satisfy the execution in favor of McMillen, at which sale Charles Greer became the purchaser of the land, and all of which occurred prior to the levy of Wintersmith's execution upon the same land, and the purchase thereof by him at the execution sale, he, for the reasons above indicated, acquired no title to the land by his purchase.

2. The fact that the sheriff's deed to Wintersmith is prior in date to that of the appellants can give to the appellees no advantage over the appellants; because the sheriff's deed must be "given such an effect as will preserve and make effectual the lien under which the execution sale was made." And in order that the deed may have such an effect, "it takes precedence over subsequent liens and transfers; and a sale and conveyance based upon such lien transfers to the purchaser all the title which the defendant held when such original lien attached. To this extent the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created": Freeman on Executions, sec. 333; *Million v. Riley*, 1 Dana, 360; 25 Am. Dec. 149.

The appellees also contend that the sheriff did not levy the executions under which Charles Greer bought said parcels of land, upon them or either of them, and for that reason Greer acquired no title to either parcel of land.

As a matter of fact, both executions are silent upon the subject of a levy, and there is nothing in the record showing that the sheriff did not levy the executions upon said parcels of land.

The sheriff having sold said parcels of land by virtue of said executions, the law, in such a state of case, presumes, in the absence of all testimony to the contrary, that he, with the executions in his hands, did his duty by levying them while they were in full force upon said parcels of land. It was his official duty so to do; and the presumption must be indulged that he discharged that duty, unless his return shows that he did not. The silence of his return upon that subject is not sufficient to repel the presumption that the levy was, in fact, made: *Freeman on Executions*, sec. 274; *Evans v. Davis*, 3 B. Mon. 346.

It is also well-settled that the defendant in an execution may waive a levy upon the property and an advertisement of it by the sheriff, and that his waiver of the levy or advertisement of the property will estop him from objecting to the sale. The waiver will also estop him from setting the sale aside after it has been made: *Freeman on Executions*, sec. 274, and the authorities there cited.

This waiver on the part of the execution defendant does not convert the sheriff into the mere private agent of the defendant. The sheriff, notwithstanding the waiver, still acts, in making the sale, in his official capacity; and the sale passes the title to the property as effectually as if a levy and advertisement had been actually made. If, however, the interest of the execution plaintiff should be affected by the failure of the sheriff to levy or advertise, then the question as to the sheriff's liability to him in damages would arise.

The contention of the appellees that said parcels of land were held by them adversely to the appellants at the time they received the conveyances from the sheriff is not an available defense. There was no adverse holding of said parcels of land at the time the sheriff sold them. And it is well settled that the law of champerty does not apply to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was

entered into, although the land be held adversely when the deed is made; and this rule applies to an executory verbal contract of sale: *Simon v. Gouge*, 12 B. Mon. 164; *Hopkins v. Paxton*, 4 Dana, 36; *Cardwell v. Sprigg's Heirs*, 1 B. Mon. 372.

It is also well settled that a purchaser at an execution sale not only acquires by his purchase the lien created by virtue of the execution, but an inchoate or equitable title to the land; and the deed of conveyance subsequently made to him by the sheriff relates back to the time of the creation of the lien by virtue of the execution, and perfects his title from that date.

It appears that in 1853, said parcels of land were sold by the sheriff of Hardin County by virtue of an execution against Kelley, Charlton D. Shean, and others, and that Kelley was the principal debtor in this execution, Shean being his surety; that at the execution sale, Kelley bought these parcels of land for a nominal sum; that he never claimed the benefit of his bids, nor was any conveyance ever made to him. It also appears that he never intended to claim the benefit of his bids, and that he had been repaid the sums that he had paid on his bids. Also, he being the principal in the execution, and Shean his surety, as between him and Shean it was his duty to have paid off and discharged said execution. And his purchase of the property at the execution sale inured to the benefit of Shean, because the property was taken to pay the debt that he, as between him and Shean, was primarily bound to pay, and which he was morally bound to pay. Therefore, the purchase by Wintersmith of Kelley's bid, after this controversy about this land commenced, for the nominal sum of "a dollar or two," did not give the appellees a superior title to said parcels of land.

The judgment of the lower court is reversed, and the case is remanded, with directions to render judgment for the appellants for both parcels of land.

EXECUTION SALE — APPLICATION OF RULE CAVEAT EMPTOR: *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98, and cases collected in note 102; note to *Meher v. Cole*, ante, p. 104; *Humphrey's Ex'r v. Wade*, 84 Ky. 391.

BONA FIDE PURCHASER AT EXECUTION SALE, HOW FAR PROTECTED: *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 651, 668, note; *Carden v. Lane*, 48 Ark. 216; 3 Am. St. Rep. 228; note to *Meher v. Cole*, ante, p. 104.

EVERY REASONABLE PRESUMPTION WILL BE INDULGED IN FAVOR OF SUSTAINING ministerial acts of officers making judicial sales: *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701, 706, note; *Hamilton v. McConkey's Adm'r*, 83 Va. 533.

CHAMPERTY — APPLICATION OF LAW OF: See *West v. Drawhorn*, 20 Ga. 170; 65 Am. Dec. 614; *Simpson v. Montgomery*, 25 Ark. 365; 99 Am. Dec. 228; *Schaferman v. O'Brien*, 28 Md. 565; 92 Am. Dec. 708; *Luen v. Wilson*, 85 Ky. 503; *Willey v. Crane*, 63 Mich. 720; *Russell v. Doyle*, 84 Ky. 386; *Nickels v. Kane's Adm'r*, 82 Va. 309; *Laney v. Havender*, 146 Mass. 615.

SHERIFF'S DEED PASSES TO PURCHASER AT EXECUTION SALE only such interest as was owned by defendant when execution lien attached: *Gentry v. Callahan*, 98 N. C. 448; *Blakeman v. P. S. Iron Co.*, 72 Cal. 321; and the lien of an execution relates to its teste, and attaches to all personalty owned by the defendant between the teste and levy, so as to defeat the title of all intermediate purchasers: *Cecil v. Carson*, 86 Tenn. 139; *Edwards v. Thompson*, 85 Id. 720; 4 Am. St. Rep. 807, and note 809. In California, if not elsewhere, an execution sale is at least as operative as a quitclaim deed executed by defendant at the moment of the sale, and hence transfers title held by him at that moment, though acquired subsequently to the levy of the writ: *Frink v. Roe*, 70 Cal. 296.

FULTON v. SHORT ROUTE RAILWAY TRANSFER CO.

[85 KENTUCKY, 640.]

RAILROAD COMPANIES. — CORPORATION CHARTERED TO BUILD "RAILROAD"

MERELY HAS RIGHT TO ELEVATE IT wherever the character of the country makes it either convenient or essential to do so. Even if this right were questionable, it would be placed beyond doubt by an amended charter of the corporation referring to city ordinances requiring the road to be elevated at the street crossings.

EMINENT DOMAIN. — WHEN PRIVATE PROPERTY HAS BEEN ONCE TAKEN FOR SPECIFIC PUBLIC USE, and compensation made, it should not be used for a foreign purpose without a new legal taking or the consent of the party from whom it was derived, but it may be applied to any new mode of user tending to the primary or general purpose. A railroad may, therefore, under legislative sanction, have a joint occupancy of a highway with other modes of travel having the same end in view, but it cannot occupy or use it to the unreasonable exclusion or obstruction of such other modes.

INJUNCTION. — CONSTRUCTION OF RAILROAD ALONG STREET IS NOT, PER SE, an encroachment upon the individual right of the abutting lot-owner, and whether he can complain depends, not upon the fact of its existence, but the manner of its construction and operation. If he is thereby deprived of the reasonable use of the street, he may appeal to the courts for relief, but if he is merely inconvenienced, or suffers some remote consequential injury, it is *damnum absque injuria*.

IF RAILROAD BE SO CONSTRUCTED AND OPERATED OVER STREETS OF CITY AS UNREASONABLY TO OBSTRUCT the abutting lot-owner's means of egress and ingress from and to his lot, or if he suffers special and substantial injury by having smoke, sparks, or cinders thrown into his house, or its walls be cracked by the movement of trains, etc., he may recover for the damages directly resulting from such causes. But before the road is built, and while it is yet a mere matter of speculation whether any such injury will result to the adjoining owners, its construction will not be enjoined merely because such injuries may result.

B. F. Buckner, Temple Bodley, and Woolley and Buckner, for the appellants.

Thomas W. Bullitt and A. Barnett, for the appellee.

HOLT, J. The charter of the Short Route Railway Transfer Company granted by the legislature in 1873 provides:—

“Sec. 2. Said corporation is hereby granted the exclusive privilege to build, construct, maintain, and operate a railway transfer company by steam or animal power, for the transportation of passengers and freight by the car-load, or otherwise, including that portion of the city of Louisville north of Main Street from the east side of First Street to the west side of Fourteenth Street, for a period of ninety-nine years, dating from January 1, 1873.

“Sec. 3. Said corporation shall have the right, by and with the consent of the general council of the city of Louisville, to the use of or right of way to such streets and alleys, and such portion of the city’s wharf within the limits named in the second section of this act, as the interests of said corporation may require, and in such manner, and under such reasonable restrictions and conditions, as may be agreed upon between said corporation and the general council of the said city of Louisville.”

Subsequent sections grant to the corporation, among other privileges, the right to connect its track with that of any other railroad terminating in the city of Louisville, and give to any shipper along its route the right to side-tracks and switches upon such terms as may be agreed upon between him and the transfer company.

A difference arose between it and the city as to the location of the road; and in the compromise it was agreed, among other things, that the road in crossing First, Second, and Third streets should be so elevated as to permit vehicles to pass under it. To do this, it became necessary to build an elevated railway along the Ohio River front of the city; and the company being about to do this, the appellees, who are abutting lot-owners, brought this action to enjoin it from either constructing or operating such a road along and over Water Street from the middle line of First Street to the middle line of Third Street, upon these grounds:—

1. That no legislative sanction had been given for the building of an elevated railway.

2. That the appellants owned the fee to the center of the street adjoining their lots, subject only to the easement of the public in it as a street; and that any legislative grant of the right of way over it to the railway company, without providing compensation therefor, was in violation of the constitutional provision as to taking private property for public use.

3. That, aside from the ownership of the soil, they, as abutting lot-owners, had a right to the unobstructed use of the street for travel, and for the purpose of ingress and egress; to receive light and air thereby; and to enjoy their property free from any inconveniences or injury special to them, such as the jarring or substantial injury to their buildings; the deprivation of light or air; the throwing of smoke, sparks, or cinders into and upon the houses already upon some of the lots, or those which might be built upon the vacant ones; the disturbance to the occupants arising from the noise of passing trains, and the invasion of all privacy by reason of their proximity; and that all these rights would be illegally invaded and destroyed by the building of the road, and that injunction is the appropriate remedy for their protection.

The word "elevated" does not occur in the charter. It authorizes the company to construct and operate "a railroad" merely. It is therefore insisted that, considering the time when the charter was granted, it is improbable that the legislature intended to authorize the construction of any kind of a railway save a surface one; that this intention is manifest from the charter provision as to side-tracks and switches, and that corporation grants must be construed with all the strictness compatible with their execution.

It appears, however, that only a portion of the appellee's road is "elevated"; and from the first introduction of railroads, portions of them have been elevated by reason of the topography of the country, or liability to floods, or the grades desirable in cities for the convenience and safety of the public. Certainly a company chartered to build a "railroad" merely would have the right to elevate it wherever the character of the country made it either convenient or essential; and the evidence shows that if this road were a surface one from First to Tenth Street, it would be frequently be submerged by the floods of the Ohio River.

After the compromise was effected between the city and the company, and on April 1, 1882, the legislature amended the

charter in various respects, and this amendment refers to the ordinances of the city of Louisville, which, among other things, required the road to be elevated at the street-crossings. It is true that it merely provides that any provisions in them in conflict with the amendment shall be void; but we must presume that it was enacted with the fact in view that a portion of the road would have to be elevated. In interpreting and giving effect to a statute, the necessity, occasion, history of the times, and probable object of it are to be considered; and while this amendment did not re-enact the city ordinances relative to the elevation of the road at the street-crossings, yet it recognized the right of the company to build a road, which those ordinances, thus referred to, required to be elevated, and which the city council, by virtue of section 3, *supra*, had the power to enact. Even if the power to build the road was questionable prior to this additional legislation, yet this legislative recognition of the right placed it beyond doubt.

It must be presumed that the appellants own the fee in the street, subject to the use by the public; and the question presents itself, whether the easement existing by virtue of the dedication as a street is of the same nature as that granted to the company by the legislature. Its power to appropriate a part of a common highway to the purposes of a railroad, without making provision for compensation to the owner of the fee, has been a fruitful subject of judicial conflict. It has been urged that it is an additional burden; a new and distinct servitude upon the estate, inconsistent with the original dedication, and cannot, therefore, be imposed without compensation to the owner of the fee. Upon the other hand, it is said that it is consistent with the dedication; that there is an identity of uses; and that the use of a part of a street by a railway does not exceed the limit of the easement already belonging to the public. This conflict of opinion mainly arises from a difference of view as to the uses contemplated by the dedication of a street to public use.

Upon the one side, cases may be found holding that because the term "street" had acquired its meaning before railroads were in existence, therefore it cannot be presumed this character of use was intended in the dedication; and if allowed, that the limit of the easement is overstepped, and the private property of the owner of the fee taken for public use, which, unless compensation be afforded, is inhibited by the

constitution. In conflict with this view, many cases may be found which hold that the dedication of a street to public use contemplates no particular mode of travel; that it embraces not only those then existing, but any that may spring up in this age of invention, and with advanced civilization; and that a railroad, being but a new mode of travel, is consistent with the uses contemplated by the dedication, and does not overstep the limits of the easement already in existence.

In determining the proper uses of a highway, it seems to us to be immaterial whether the abutting owner has the fee subject to the easement or not. The public right embraces all modes of travel consistent with the intended use. If compensation has been made for the easement, the subsequent appropriation to another mode of use within the limit of the primary purpose, or one of a like kind, certainly should not require further compensation. In this age of advancement, a rule confining it to a precise mode of use would be unreasonable. It has even been held that there is no new taking when, under legislative sanction, a plank road or a canal is converted into a different kind of highway, as, for instance, a railroad; and some jurists have contended that when private property has been once taken for public use, and compensation made, the legislature may apply it to any public use, irrespective of the special purpose for which it was taken. This view is based upon the idea that, in practice at least, whether the fee or an easement merely is acquired, the full value of the land taken is given as compensation; but this doctrine is fraught with danger to private right, which, although it may be that of the humblest citizen, it should be the pride of the judiciary to uphold; and it seems to us that where a grant has been made for a specific use, the subject of it should not be used for a foreign purpose without a new legal taking, or the consent of the party from whom it was derived; but that it may be applied to any new mode of user tending to the primary or general purpose.

It was said by the supreme court in the case of *Barney v. Keokuk*, 94 U. S. 340: "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights whether the fee is in the public or in the adjacent landowner, or in some third person. In either case, the street is legally open and free for the public passage, and for such other

public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas-pipes, and the like."

Pierce on Railroads, page 234, says: "The purpose of opening a highway or street is to provide the public with a right of passage for persons on foot or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles operated in such a mode and by such forces as an advanced civilization may require for the general convenience. The improved method of conveyance may incidentally increase or depreciate the value of property on the highway; but provided the right of ingress and egress of passage and repassage is left reasonably free to the adjoining owner, the injury is one which the law does not recognize. A railroad laid out over or upon a highway or street under proper legal authority is within the legal intent of the original sequestration or dedication, and is not an invasion of private right, entitling the owner to compensation by virtue of the constitutional prohibition, provided it is so laid out and constructed as not to be incompatible with the use of the highway in the other usual modes of passage and conveyance. It is not necessarily a nuisance, even in a large city, although it may, to a certain extent, interrupt the free passage of other kinds of vehicles; and unless unreasonable, or permanently exclusive in its occupation of the highway, when authorized by competent authority, it is not an invasion of private rights." The writer cites numerous cases in support of the text.

The design of a railroad is to facilitate travel. It therefore subserves the object of a street dedication instead of destroying it. It may, therefore, under legislative sanction, have a joint occupancy of a street with other modes of travel having the same end in view; but it cannot occupy or use it to the unreasonable exclusion or obstruction of such other modes. The limitation upon the public right is, that the appropriation of the street must not be inconsistent with the end for which it was established.

Whether the abutting lot-owner owns the fee in the street, subject to the public use, or does not, he, as such adjacent proprietor, has, however, a peculiar private right in the street which at-

taches to his lot. He has a peculiar use in the street as appurtenant to his tenement, in order that he may enjoy it. This right is as much his property as the lot itself. He can claim no damage by reason of mere inconvenience or a consequential decline in value of property or rents arising from the repair of the street; but there can be no such exclusive appropriation of it, even under legislative authority, as to deprive him of its reasonable use. He is entitled to its reasonable use for all the ordinary modes of passage. This is an easement attaching to his adjoining lot, an incident of his title to it, and he cannot be deprived of it without compensation. He, however, holds his property subject to the appropriation of the street by the public to such means of facilitating travel and commerce as will most redound to the public good; and it is only when this appropriation becomes destructive of the purposes for which the street was established, and he is deprived of its reasonable use for such purposes, that he can complain. Indeed, the right under legislative authority to permit the construction and operation of a railroad by steam along or upon a street is not now an open question in this state, however much conflict of authority may exist elsewhere; and this without regard to whether the fee subject to the public use is in the adjoining owner, or not. Beginning with the case of *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497, followed by the cases of *Wolfe v. Covington etc. R. R. Co.*, 15 B. Mon. 409; *Louisville etc. R. R. Co. v. Brown*, 17 Id. 772; *Newport and Cincinnati Bridge Co. v. Foote*, 9 Bush, 264; *Cosby v. Owensborough etc. R. R. Co.*, 10 Id. 288; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Id. 382; 19 Am. Rep. 67; and *Jeffersonville etc. R. R. Co. v. Esterle*, 13 Bush, 675,—this doctrine has been repeatedly announced, and must now be regarded as firmly established in Kentucky, and we think it is supported by reason and public necessity, while at the same time individual right is preserved.

It follows that the construction of a railroad along a street is not *per se* an encroachment upon the individual right of the abutting lot-owner; and whether he can complain depends, not upon the fact of its existence, but the manner of its construction and operation. If he is thereby deprived of its reasonable use, he may appeal to the courts for relief; but if he is merely inconvenienced thereby, or suffers some remote consequential injury, it is *damnum absque injuria*.

The structure in this case, at the point where it is sought to enjoin its construction, will be about thirteen and one half feet high, supported by iron pillars sixteen inches in diameter, and from twenty-five to thirty feet apart; and where they are in the street, there is ample road way upon each side of them, while where they are in the sidewalk, they leave ample room for passage, and we fail to see that there is any unreasonable obstruction or exclusive appropriation of the street, while the character of the proposed structure is such that it is not likely to materially interfere with the passage of either light or air.

Before leaving this branch of the case, it is proper to suggest, that in the cases of *Louisville etc. R. R. Co. v. Brown, supra*, *Newport etc. Bridge Co. v. Foote, supra*, and *Cosby v. Owensborough etc. R. R. Co., supra*, the railroad was elevated either by a solid wall or an embankment, which was *pro tanto* an exclusive appropriation of the street; but as it was not unreasonably obstructed, the complaint of the abutting lot-owners was not sustained.

The road the construction of which is now sought to be enjoined by reason of its manner of elevation will afford less obstruction than did the building of the roads in those cases.

It is urged, however, that it will be specially injurious to the adjacent lot-owners, and in a substantial degree, because it will jar their buildings, weaken their foundations, throw sparks, smoke, and cinders into them by reason of their proximity, destroy their privacy, and render them untenable; and that these substantial injuries peculiar to them, and to which the general public are not liable, authorize the interposition of preventive equity. It is true, it is not the amount of pecuniary injury which authorizes such relief. If the injury goes to the substance of the right, and is of such a character that reasonable redress cannot be had at law, the chancellor will, with the arm of equity, stay the impending wrong.

Whether any special and substantial injury will result to the adjoining owners in this instance is, however, as yet a mere matter of speculation, and if any, its character or extent cannot now be ascertained. If such should accrue, its extent can be much better estimated after the road is in operation; and at most, it would be a matter of mere damage, for which the law affords an adequate remedy.

Undoubtedly, if the structure shall be so located as to un-

reasonably obstruct the abutting lot-owner's means of egress and ingress from and to his lot, or if he suffers substantial injury by having smoke, sparks, or cinders thrown into his house, or its walls be cracked by the movement of heavy trains, he would be entitled to recover for the damages directly resulting from such causes.

This is because a private right would then be invaded, and a direct substantial damage sustained: *Jeffersonville etc. R. R. Co. v. Esterle*, and *Elizabethtown etc. R. R. Co. v. Combs*, *supra*.

It was said, however, in the case of *Lexington etc. R. R. Co. v. Applegate*, *supra*: "But both public policy and a long series of adjudged cases require that a public improvement so beneficial in its general operations and results, and more especially when, as in this case, sanctioned by the legislature and the representatives of the local public, should not be destroyed or suspended by the injunction of a chancellor, unless strong reasons for doing it be conclusively manifested."

This reason applies with peculiar force in this instance. The proposed work is one likely to redound largely to the public interest and that of a commercial metropolis. The road will connect the railroads coming into the city upon one side with those reaching it upon the other, thus supplying, as is shown by the testimony, a now much needed connection; while, upon the other hand, it is as yet a matter of conjecture what injury, if any, will accrue to the lot-owner; and if any, he is not remediless.

The law, of course, will not override individual right in order that a public benefit may accrue; but, under such circumstances, the facts should be clearly shown, and the ground made manifest, before the chancellor should interfere.

Judgment affirmed.

POWER OF STATE, OR OF MUNICIPALITY AS ITS AGENT, TO AUTHORIZE USE OF STREET BY RAILROAD: *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; 67 Am. Dec. 662-665, note; *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, 352, note; *St. Louis etc. R'y Co. v. City of St. Louis*, 92 Mo. 160.

RIGHT TO EXERCISE RIGHT OF EMINENT DOMAIN IN BEHALF OF RAILROADS: *Stewart v. Supervisors*, 30 Iowa, 9; 1 Am. Rep. 238; *Little Rock Junction R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51.

APPROPRIATION OF HIGHWAY FOR RAILROAD IMPOSES NEW SERVITUDE THEREON, entitling the owner of the soil to compensation for the new use: *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 651; *Imlay v.*

Union Branch R. R. Co., 26 Conn. 249; 68 Am. Dec. 392; compare *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Perry v. New Orleans etc. R. R. Co.*, 55 Ala. 413; 28 Am. Rep. 740.

ANNOYANCE FROM NECESSARY USE OF RAILROAD IS NOT NUISANCE PER SE: *Bell v. Ohio etc. R. R. Co.*, 25 Pa. St. 161; 64 Am. Dec. 687. But a railroad company using a public street for a terminal yard, without compensation to adjacent land-owners, and thereby causing a nuisance to neighboring dwellings, may be restrained by injunction, although such use is authorized by the legislature, and is necessary to the business: *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316; 56 Am. Rep. 1, note 6-16.

WHEN ACTION LIES TO RESTRAIN BUILDING OF STREET-RAILROAD not authorized by city: *Atchison Street-Railway Co. v. Nave*, 38 Kan. 744; 5 Am. St. Rep. 300.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

DORRAH v. ILLINOIS CENTRAL RAILROAD Co.

[65 MISSISSIPPI, 14.]

RAILWAY COMPANY MUST ANNOUNCE THE NAME OF THE STATION on the arrival of the train thereat, and give passengers an opportunity to alight in safety. Failing to do this, the company is answerable in damages to any person injured thereby.

EXEMPLARY DAMAGES WILL NOT BE ALLOWED FOR FAILURE TO STOP A TRAIN AT A STATION, and give a passenger opportunity to alight therefrom, unless the failure to stop was willful, or the wrong was aggravated in some manner by the railroad company or its employees.

MENTAL SUFFERING IS NOT AN ELEMENT OF DAMAGES UNLESS BASED ON BODILY INJURY, or unless the injury from which it results was attended by circumstances of malice, insult, or oppression.

ACTION against the defendant, a railway company, for damages. The plaintiff was a passenger on a train run by the defendant, holding a ticket for Madison station, at which point he wished to leave the train. On approaching the station, no bell or whistle was sounded, nor was the name of the station announced. The train slackened somewhat, but did not stop. It was then two o'clock at night, and the plaintiff was carried to a point twenty miles distant before it was possible for him to leave the cars. It cost him thirty-five cents to purchase a ticket to return on the next train to his station, and he lost one day's time, worth two dollars to him. The plaintiff offered to prove the condition of his family on the night in question, and that he suffered great mental anxiety from being unable to leave the cars at his station for

the purpose of joining them. The evidence was excluded on the objection of the defendant. The jury was instructed by the court that the case was not a proper one for punitive damages, and that the recovery by the plaintiff must be limited to the actual damages by him sustained. A verdict was accordingly rendered in favor of plaintiff for \$2.35. From the judgment based on such verdict plaintiff appealed.

G. W. Thands and William Buchanan, for the appellant.

W. B. and J. B. Harris, for the appellee.

ARNOLD, J. It was obligatory on the railroad company to announce or give notice in some way of the name of the station on the arrival of the train at Madison station, and to stop the train long enough for appellant to get off with safety, and the company was liable for any loss or injury sustained by him on account of this not being done: *Louisville etc. R. R. Co. v. Mask*, 64 Miss. 738.

Whether the failure of the train to stop at Madison station resulted from inadvertence, or a willful disregard of duty and of appellant's rights, is not shown by the record. There is no testimony on this point, but it does appear that no special injury or damage was done to appellant, and that the jury allowed him full compensation for the loss of time and expense incurred by reason of his being carried beyond the place of his destination. In our judgment this was the just and lawful measure of his recovery, and the court below committed no error in instructing the jury that exemplary damages should not be awarded. In order to have justified the infliction of exemplary damages, or proof of mental anxiety occasioned by separation from his family, it was necessary for appellant to have shown that the failure to stop the train was willful, or that the wrong was aggravated in some manner by the railroad company or its employees: *Chicago R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 373; *Vicksburg etc. R. R. Co. v. Scanlan*, 63 Miss. 413.

Mental suffering is not readily distinguishable from physical suffering, and to become an element of damages, it must be based on bodily injury, or the injury by which it is produced must be attended by circumstances of malice, insult, or oppression: *Pierce on Railroads*, 302; *Johnson v. Wells, Fargo, & Co.*, 6 Nev. 224; 3 Am. Rep. 245; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *Bovee v. Town of Danville*, 53 Vt. 183;

Canning v. Inhabitants of Williamstown, 1 Cush. 451; *Trigg v. St. Louis etc. R. R. Co.*, 6 Am. & Eng. R. R. Cas. 345; 74 Mo. 147; 41 Am. Rep. 305.

Affirmed.

RAILROAD COMPANIES. — DUTY OF CONDUCTOR OF RAILWAY TRAIN TO ANNOUNCE STATION AND GIVE PASSENGERS OPPORTUNITY TO ALIGHT: *Raben v. Central Iowa R'y Co.*, 73 Iowa, 579; 5 Am. St. Rep. 708, and note 710; *St. L., I. M. & S. R'y Co. v. Person*, 49 Ark. 182.

INJURY TO FEELINGS OR MENTAL SUFFERING AS ELEMENT OF EXEMPLARY DAMAGES: *International etc. R. R. Co. v. Telephone etc. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45, and cases collected in note 48; *Reeves v. Winn*, 97 N. C. 246; *Ward v. Blackwood*, 48 Ark. 396; *Southern R'y Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766; note to *West v. W. U. Tel. Co.*, ante, p. 530.

HAMBRICK v. WILKINS.

[65 MISSISSIPPI, 18.]

ONE WHO RESCINDS A CONTRACT OF SALE FOR FRAUD PRACTICED ON HIM, and offers to return to the vendor the property purchased, is not obliged, on refusal of the vendor to receive the property, to keep it until the termination of the controversy between them. He may either retain the property as agent of the vendor, or, after notice to him, may, in good faith, sell it on his account. If, however, the purchaser gives the property away, or wantonly sacrifices it by selling it for a grossly inadequate price, he must account to the vendor for the difference between the price received and the reasonable value of the property, less the expense of keeping it up to the time of the sale.

ATTACHMENT — VARIANCE. — Plaintiff may not attach for one cause of action, and having sustained his writ, declare for another.

GROUND OF ATTACHMENT, that the "defendant fraudulently incurred the obligation for which suit is brought," is sustained by showing a breach of warranty, and that the warranty was fraudulently made.

Rives and Rives, for the appellant.

Bogle and Bogle, for the appellee.

COOPER, C. J. This is an action by attachment brought by the appellee against the appellant to recover damages for the breach of a warranty in the sale of a jack.

The ground of attachment alleged is, that the defendant "fraudulently incurred the obligation for which suit is brought." At the return term the defendant traversed the ground of attachment, and on this issue a verdict was found in favor of the plaintiff.

On the trial of this issue, evidence was introduced tending to show that the plaintiff, after having notice of the falsity of

the warranty, and after he had for some time held possession of the jack, paid to the defendant the purchase price. On the other hand, the plaintiff introduced evidence tending to show that while he had been in possession of the jack (during which time he refused to serve mares, by reason of which the plaintiff doubted his value), he was further deceived by the defendant and his agent, who secretly manipulated and physicked the jack, thereby inciting him to service, by which plaintiff was relieved of his doubts, and that it was while this deception continued that he made the payment of the purchase price. It was further shown that some weeks after payment had been made, the plaintiff tendered the jack to defendant and demanded restitution of the purchase price, and this tender being declined by the defendant, the plaintiff placed the jack in a livery-stable as the property of defendant, and some time after this, being informed by the stable-man that he looked to plaintiff for the cost of keeping the animal, he agreed with the keeper that he should take the jack for his feed bill, which he did, and afterwards sold him for \$120.

The appellant contends that the plaintiff, by paying the purchase price after knowledge of the falsity of the warranty, waived the fraud, and thereby lost all right of action resting on the same; and further, that by disposing of the animal to the stable-keeper in payment of the feed bill, he disabled himself from returning it to the defendant, and is therefore precluded from rescinding the contract.

Neither of these positions is fatal to the right of action asserted by the plaintiff. On the trial of the issue traversing the ground of attachment, and also upon the issue in chief, the jury was distinctly informed that if the plaintiff consummated the purchase after notice of the falsity of the facts warranted, he could not rescind. By its verdict the jury negatived the fact of such knowledge, and for this finding there is ample support in the testimony.

It is not true that one who is the victim of a fraud, and who, discovering the facts, rescinds the contract, and offers to return the property, which is refused by the seller, is obligated to keep the property for the seller until the end of the controversy between them, so that he may return it to him upon recovery of the purchase price. A purchaser who is defrauded by the seller, and who in the lawful exercise of his right to rescind tenders the property to the seller, who refuses to receive it, is under no other obligation to him than to retain the prop-

erty as his agent and bailee, and after notice of his intention, may in good faith dispose of the same for account of the owner: *Swann v. West*, 41 Miss. 104.

If he sells the property otherwise than in good faith, the extent of his liability would be the fair market value of the same.

We assent to the proposition advanced by appellant, that a plaintiff may not attach for one cause of action, and having sustained his writ declare for another: *Wright v. Snedecor*, 46 Ala. 92; *Ligon v. Bishop*, 43 Miss. 527.

But there is no variance between the cause of action for which the attachment was sued out and that declared in the declaration. The declaration was for breach of warranty. This gave a right of action. The ground for suing out the attachment was that the warranty so broken was fraudulently made.

The case was, we think, fairly submitted to the jury by the instruction of the court, and the evidence supports the verdict on the attachment issue, and measurably that on the issue in chief. On the latter issue, the recovery was somewhat too great, in that nothing was allowed to the defendant as the value of the jack. The plaintiff, as we have said, might, after tender of return and refusal to accept by the seller, have either kept the animal until after trial, as the agent of the owner, or might, in good faith, after notice to the owner, have sold the animal for his account. But it was not within his power to give it away, or to wantonly sacrifice it by turning it over to the keeper of the stable for the price of a few days' keep. Having done so, the measure of his recovery is the difference between the purchase price paid by him and the reasonable value of the jack, less the expense of keeping him. For the error in the extent of the recovery, the judgment is reversed, and a new trial awarded. This will not affect the verdict on the attachment issue, which is not disturbed.

Judgment reversed.

RESCISSION OF CONTRACT OF SALE ON GROUND OF FRAUD: *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 425-431, note; *Whitworth v. Thomas*, 83 Ala. 308; 3 Am. St. Rep. 725; *McCulloch v. Scott*, 13 B. Mon. 172; 56 Am. Dec. 561; *Rover Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285; *Bell v. Keepers*, 39 Kan. 105; because made by an agent who received commission from the adverse party: See note to *Potter's Appeal*, ante, p. 272.

ATTACHMENT REGULAR UPON ITS FACE IS NOT VOID because the complaint does not set up a cause of action which would warrant the issuance of an attachment: *McComb v. Reed*, 28 Cal. 281; 87 Am. Dec. 115.

ONE GROUND OF ATTACHMENT IS SUFFICIENT TO MAINTAIN a writ that has been issued on two grounds. If one ground is proved and the other cannot be, the writ will be upheld: *Tucker v. Frederick*, 28 Mo. 574; 75 Am. Dec. 139. And in an action on an attachment bond to recover damages for wrongfully suing out the writ, defendant is not limited to proof of the existence of the particular ground alleged in his affidavit, but may show any other ground which authorized an attachment: *Bazley v. Segrest*, 85 Ala. 183.

ELLIS v. STATE.

[65 MISSISSIPPI, 44.]

CONFESSION. — THE COURT SHOULD, BEFORE ADMITTING A CONFESSION IN EVIDENCE, conduct a preliminary investigation, out of the presence and hearing of the jury, if requested by the defendant, to determine whether it is competent or not.

OF THE COMPETENCY AS EVIDENCE OF AN ALLEGED CONFESSION, THE COURT is the sole judge. The jury cannot reject it because they deem it incompetent.

AFTER A CONFESSION HAS BEEN ADMITTED BY THE COURT, either party has the right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide whether the confession was competent, and all other facts and circumstances relevant to the confession, or affecting its weight as evidence; and if it should be made to appear at this point, or any other during the trial, that the confession was made under such circumstances as to render it incompetent, it should be excluded from evidence by the court.

CONFESSION. — JURY ARE NOT BOUND TO BELIEVE OR GIVE WEIGHT TO A CONFESSION because the court has decided it to be competent evidence before them. They may believe or disbelieve it, the same as other testimony properly submitted for their consideration.

FORMER DECISION OF THIS COURT, THAT WHETHER A CONFESSION WAS VOLUNTARY OR NOT might be determined by the jury, in cases where there was a conflict of evidence on the subject, is overruled.

CONFESSIONS. — INSTRUCTION TO JURY, asked by defendant's counsel, to the effect that they "may consider the admissions made by defendant, and give them such weight as they may deem them entitled to under all the circumstances of the case, and if the jury believe from the evidence that the confessions of defendant were brought about by fear, and were not true, they will disregard them," should not be refused.

INDICTMENT for arson. Confessions of defendant were offered and received in evidence. Subsequently, during the trial, the defendant offered evidence, which was heard by court and jury, to show that the confessions were not voluntary, and then moved to exclude them. Motion denied. During the argument before the jury, defendant's counsel urged that the confessions had been procured by threats. To this the prosecuting attorney replied, that as the confessions had been

admitted in evidence by the court, the question of their competency could not be considered by the jury; that the jury must treat the confessions as voluntarily made, but were, nevertheless, the sole judges of the weight and value of the testimony concerning the confessions, and might believe or disbelieve, as they thought the witnesses entitled to credit; that if they believed the testimony of the witnesses concerning the confessions, they should give them such weight as they thought them entitled to. The defendant's counsel objected to these statements of the prosecuting attorney, and asked the court to correct them. Thereupon the court declined to interfere, on the ground that the statements were not improper. Defendant asked for the instruction to the jury stated in the last point of the *syllabus*. It was refused. He was convicted, and thereupon appealed.

F. B. Pratt, for the appellant.

T. M. Miller, attorney-general, for the respondent.

ARNOLD, J. Before a confession is received in evidence against a defendant in a criminal trial, it should be shown that it was voluntary,—that is to say, made without the influence of hope or fear being exerted on the accused by any other person. Whether it was so made or not is a preliminary matter for the court, and not for the jury, to determine. The jury have nothing to do with the competency of evidence; that is a question exclusively for the determination of the court. The court should decide in the first place, after investigation, whether a proposed confession shall be heard by the jury or not; and if it is deemed competent by the court, and is permitted to go to the jury, they are the exclusive judges of its weight and value as evidence. When it is proposed to introduce in evidence a confession of the accused against himself, the court should, upon a preliminary investigation conducted out of the presence and hearing of the jury, if requested by the defendant, determine whether it is competent or not. If satisfied, after hearing all the testimony pertinent to the inquiry, that the confession is admissible, it should go to the jury; but unless it plainly appears that it was free and voluntary,—if there is a reasonable doubt against its being free or voluntary,—it should be excluded from the jury: *Simmons v. State*, 61 Miss. 243.

After a confession has been admitted by the court, either

party has a right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide the question of competency, and all other facts and circumstances relevant to the confession, or affecting its weight or credit as evidence; and if it should be made to appear at this point, or any other during the progress of the trial, that the confession was made under such circumstances as to render it incompetent as evidence, it should be excluded by the court.

The jury cannot reject or disregard a confession which has been admitted by the court merely because they may deem it incompetent, for the competency or incompetency of evidence is a legal question not within their province; but on the other hand, they are not bound to believe or attach any weight or credit to a confession on the ground alone that the court has decided that it was admissible, and might be heard by them. The jury has the same freedom of action in reference to confessions which they have in regard to other testimony: *Brister v. State*, 26 Ala. 107; *Commonwealth v. Knapp*, 10 Pick. 477; 20 Am. Dec. 534.

The declaration made in *Garrard v. State*, 50 Miss. 147, to the effect that whenever there is a conflict of testimony as to whether a confession was voluntary or not, it then becomes a question of fact to be determined by the jury, and the court is thereby relieved of the duty and responsibility of deciding as a preliminary matter whether it was voluntary or not, is erroneous, and the decision on that point is disapproved and overruled: 1 Greenl. Ev., sec. 219; Wharton's Crim. Ev., sec. 689; *Simmons v. State*, 61 Miss. 243; 1 Phillips on Evidence, 3-7, and 543.

The second instruction asked by appellant, and refused, should have been given. It is true that it suggests in one part that the jury should disregard the confession if they believed it incompetent or "brought about by fear"; but this was coupled with the declaration that it was not to be so treated unless they also believed that it was untrue. Of course, if the confession was believed by the jury to be untrue, no matter from what cause, it should have been disregarded as evidence.

The instruction would have been more accurate if it had simply informed the jury that if they believed from the evidence that the confession was untrue they should disregard it, or if they believed from the evidence that it was made under the influence of hope or fear, they should take this into ac-

count in determining what weight or credit, if any, they would attach to it as evidence.

Reversed and remanded.

CONFESSIONS AS EVIDENCE, AND WHEN ADMISSIBLE AS VOLUNTARY: *Carr v. State*, 24 Tex. App. 562; 5 Am. St. Rep. 905, and note 908; *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882, and cases collected in note 887; *Biscoe v. State*, 67 Md. 6; *Ross v. State*, 67 Id. 286; *People v. Yeaton*, 75 Cal. 415; *State v. Ellis*, 97 N. C. 447.

CONFESSIONS. — THE COURT ALONE SHOULD ASCERTAIN THEIR COMPETENCY, and it is the duty of the court, before allowing witnesses to testify in regard to the confessions of a prisoner, to determine their admissibility by preliminary questions outside the hearing of the jury: *Biscoe v. State*, 67 Md. 6; *Pascal v. State*, 77 Ga. 596.

BOARD OF SUPERVISORS OF LAUDERDALE COUNTY *v.* ALFORD.

[65 MISSISSIPPI, 63.]

INTERPLEADER WILL NOT BE COMPELLED, WHERE THE DOUBT AS TO WHICH OF TWO PERSONS IS LIABLE DOES NOT ARISE FROM UNCERTAIN OR UNKNOWN FACTS, and the only question is, what is the law applicable to conceded facts.

SURETIES ON THE BOND OF THE SAME OFFICIAL FOR DIFFERENT TERMS. —

If moneys are misappropriated by the agent of a county treasurer, and he conceals this fact, and procures moneys and exhibits them to the county officials during his term of office, and also during one or more settlements after entering on the discharge of his duties for a second term, and then proclaims the misappropriation, and refuses to make it good, his default must be regarded as having been made in the second term, and his sureties for that term are the ones who are answerable.

SUBROGATION. — If a county treasurer, whose agent or deputy has misappropriated the public funds, takes a note from such agent for the sum misappropriated, with a third person as surety on the note, the county is entitled to be subrogated to the treasurer, and to enforce the note against the maker and his surety.

CONSIDERATION OF NOTE IS NOT ILLEGAL when it is given by an agent of a county treasurer, whom the latter had, without authority of law, appointed to conduct the office, to secure the repayment of moneys previously misappropriated by such agent.

BILL against Alford, formerly county treasurer for two terms, and against his sureties for both terms, and against Latham and Ragsdale, who had executed a note under circumstances hereinafter set forth. During Alford's first term, he employed L. K. Latham as his agent to discharge the duties of his office. Latham misappropriated \$6,441.97, and executed to Alford his note for that amount, with Ragsdale as

surety. The default of Latham was concealed. When Alford entered upon the discharge of his duties for the second term, he accounted with the supervisors for the full amount which he would have had on hand had the misappropriation not occurred, and exhibited to them all the moneys which the books showed ought to be on hand. At the meeting of the board held three months later, he announced the defalcation of his agent, which had occurred in the previous term, and acknowledged that he had been able to exhibit the proper amount of moneys at the prior meetings by the aid of a temporary loan. The bill prayed that inasmuch as there were grave doubts which set of sureties were liable, that both sets be required to appear and interplead, and that the liability might be fixed where it belonged. Also that the county be subrogated to the rights of Alford on the note executed in his favor by Latham and Ragsdale. To the bill, three demurrers were interposed. The demurrer of the sureties on the first bond suggested that there was an adequate remedy at law; that the defalcation did not occur during the term for which they were sureties, and that Alford had no authority to appoint Latham agent. The demurrer of the sureties on the second bond was on substantially the same grounds. Latham and Ragsdale having died, their representatives demurred, challenging the right of the county to subrogation, and insisting that the note was void and without consideration. All the demurrers were sustained.

Walker and Hall, for the appellant.

Whitaker, Dial, and Witherspoon, and Woods, McIntosh, and Williams, for the appellees.

CAMPBELL, J. Had the bill been so drawn as to show that the facts are unknown as to which set of sureties are liable, the jurisdiction of chancery would have been undoubted: *Gay v. Edwards*, 30 Miss. 218; *Tate v. De Soto*, 51 Id. 588.

But the criticism is a just one, that the only uncertainty alleged is as to the law upon the facts stated, and if this was a recognized ground for the interposition of a court of equity, there would scarcely be a need for courts of law.

On the facts stated, our present view is, that there is no liability on the first bond, not because Alford was represented by another in conducting the business of his office, but because he was not a defaulter during his first term. Grant that Latham,

who acted for him, misapplied the money, Alford made it all right with the county, and reported the sum due, and produced the money to be counted, as required by law, and this was during his second term of office, wherefore it seems that any default by him was after the second bond was given, and not while the first was a security for his official acts.

The demurrer of the sureties on the first bond was properly sustained, and then the bill was no more than an action on the second bond presenting no ground for proceeding in chancery against them, and for that reason the demurrer of the sureties on the second bond was properly sustained.

But as Alford is liable for all the money due the county, and as the note for \$6,447.91 executed by Latham with Ragsdale as surety was made to represent and secure the payment of the debt, equity will lay hold of the security and place the burden at once where it should be borne, substituting the creditor to the rights of Alford, and enforcing the claim he could enforce for this debt: Sheldon on Subrogation, sec. 167.

The consideration of the note was not illegal, and the note is not void on such ground.

Newsom v. Thighen, 30 Miss. 414, is authority only for the proposition that the note in that case could not be recovered on by the successor in office of the payee. It was not valid as an obligation to the officer in his official capacity. The conclusion of the opinion intimates its validity as a personal contract with the payee. Any other view is clearly erroneous.

McWilliams v. Phillips, 51 Miss. 196, was decided improperly, and we decline to follow it. In it there was a misapprehension and misapplication, not only of *Newsom v. Thighen*, *supra*, but of well-settled principles. But, besides this, here the note was given to evidence and secure an unquestionable liability of Latham to Alford after it had been incurred, and there is that difference between this case and those cited. There is no semblance of illegality in the consideration of the note. The demurrer of Alford and the representatives of Ragsdale and Latham was improperly sustained, and as to this the decree is reversed, that demurrer overruled, and answers required in thirty days after mandate filed.

WHEN BILL OF INTERPLEADER LIES: See *Tyus v. Rust*, 37 Ga. 574; 95 Am. Dec. 365, and cases collected in note 367; *Bechtel v. Shaefer*, 117 Pa. St. 555.

STATUTORY INTERPLEADER — PRACTICE, PLEADING, etc.: *Clark v. Mosher*, 107 N. Y. 118; 1 Am. St. Rep. 798, and note 800-802.

LIABILITY OF SURETIES LIMITED TO OFFICIAL TERM OF PRINCIPAL: *Wapello County v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370, and note 374; *Inhabitants etc. v. Shaver*, 50 Me. 36; 79 Am. Dec. 592; *Treasurer of Vermont v. Mann*, 34 Vt. 371; 80 Am. Dec. 688. And where the same person is elected and acts as treasurer for three successive terms, and it afterwards develops that money deposited with him as treasurer had been misappropriated, it will be presumed, in the absence of evidence to the contrary, that the misappropriation took place at the end of his last term, and the sureties on his last official bond are liable therefor: *Heppe v. Johnson*, 73 Cal. 265.

SUBROGATION. — WHEN THIRD PARTY IS ENTITLED TO BE SUBROGATED TO RIGHTS OF CREDITOR: *Fears v. Albee*, 69 Tex. 437; 5 Am. St. Rep. 78, and note 85.

EX PARTE O'LEARY.

[65 MISSISSIPPI, 180.]

NUISANCE, POWER OF MUNICIPAL CORPORATION TO DECLARE WHAT IS A. —

A municipal corporation cannot make that a nuisance which is not such in fact; therefore an ordinance which declares that "all hog-pens, or lots now used as such, are hereby declared a nuisance, and shall be abated," is too broad and sweeping in its provisions, and is invalid.

HABEAS CORPUS. — The detention of the prisoner was justified under an ordinance, for the violation of which she had been arrested. The substance of the ordinance is stated in the *syllabus*. The prisoner was remanded to the custody of the city marshal, and therefore appealed.

E. E. Baldwin, for the appellant.

D. Shelton, for the city of Jackson.

CAMPBELL, J. The process by virtue of which the prisoner was held conforms to the ordinance of the city, and the single question for the decision on trial of the writ of *habeas corpus* was as to the validity of the ordinance. It is too broad and sweeping in its provisions, and is invalid. Hogs in the city of Jackson may or may not be a nuisance, and any ordinance on the subject should be framed accordingly: *Wood on Nuisances*, sec. 518.

Reversed and prisoner discharged.

MUNICIPAL CORPORATION MAY NOT DECLARE THAT TO BE a nuisance which in fact is not, though it is by law empowered to declare what shall be a nuisance: *Village of Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524; *Pauer v. Albrecht*, 72 Wis. 416.

MOORE v. JORDAN.

[65 MISSISSIPPI, 229.]

TRUST DOES NOT RESULT IN FAVOR OF THE GRANTOR IN A DEED WHEN IT RECITES A PECUNIARY CONSIDERATION, THOUGH NOMINAL, if the *habendum* declares a use in favor of the grantees, who are children of the grantor, and the deed contains covenants of warranty.

DECLARATION OF TRUST BY PAROL BY GRANTEE IN FAVOR OF THE GRANTOR is void by the code of Mississippi.

GRANTOR CANNOT AVOID HIS DEED AS FRAUDULENT WHEN HE MADE IT FOR THE PURPOSE OF COERCING A COMPROMISE with creditors, and with the expectation of receiving a reconveyance when this purpose should be accomplished. This result is not varied by the fact that the conveyance was advised by a person other than the grantee, and such person promised that the reconveyance should be made.

BILL by Mrs. Moore against her mother, Mrs. Jordan, for an accounting for the rents and profits of certain real estate. Cross-bill by Mrs. Jordan, asking that the conveyance of the same realty made by her to Mrs. Moore be set aside. The circumstances attending the execution of this conveyance, on which the defendant relied for relief, were as follows: One Williams, under whom all the parties claimed title, had been a surety on the bond of an official, who had become a defaulter. Williams died, and one Grayson became administrator of his estate. Mrs. Jordan was the daughter of Williams, and as such entitled to his estate. Grayson suggested to her to convey the property to her two daughters, Mrs. Grayson and Mrs. Moore, in order to avoid the payment of the amount due from Williams as surety, or at least to bring about a more favorable compromise than might otherwise be obtained; and he promised that a reconveyance should be made when the purpose of the conveyance had been accomplished. Mrs. Grayson reconveyed, as her husband had promised, but Mrs. Moore refused to be bound by his agreement. The contents of the conveyance, so far as material, are as follows: "I, M. A. Jordan, in consideration of the natural love and affection I have for A. A. Grayson and B. J. Moore, and also in consideration of the sum of one dollar in hand paid, have this day granted, bargained, and sold to the said A. A. Grayson and B. J. Moore [here describing the realty], to have and to hold to the said A. A. Grayson and B. J. Moore, their heirs and assigns forever. And I hereby covenant to and with the said A. A. Grayson and B. J. Moore to forever warrant and defend the title to the same free from the claims of all and every person or persons claiming the same whomsoever." The

hancellor granted the relief sought by the cross-bill, and dismissed the original bill. Mrs. Moore thereupon appealed.

Oglesby and Taylor, for the appellant.

Shands and Johnson, for the appellee.

COOPER, C. J. The rule that a trust resulted to the grantor upon a voluntary conveyance, according to the common-law forms of feoffment, grant, fine, or recovery, etc., where no consideration is expressed or implied, and no trust is declared, and the circumstances rebut the presumption of a gift, seems not to apply to modern conveyances: 1 Perry on Trusts, 184.

Mr. Pomeroy thinks it would apply to such conveyances if the deed "simply contains words of grant or transfer, and does not recite nor imply any consideration, and does not, in the *habendum* clause or elsewhere, declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift": 2 Pomeroy's Eq. Jur., sec. 1035.

However this may be, it is evident that in the case before us no trust resulted to the grantor from the deed, for it recites a pecuniary consideration, though nominal: *Russ v. Mebius*, 16 Cal. 350; *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446; *Leman v. Whitley*, 4 Russ. 423; *Philbrook v. Delano*, 29 Me. 410; *Graves v. Graves*, 29 N. H. 129; *Groff v. Rohrer*, 35 Md. 327; 2 Story's Eq. Jur., sec. 1199. The *habendum* declares a use to the grantees, who are the children of the grantor, and there is a covenant of warranty: 2 Pomeroy's Eq. Jur., sec. 1035; *Gould v. Lynde*, 114 Mass. 366; *Bragg v. Geddes*, 93 Ill. 39; *Groff v. Rohrer*, 35 Md. 327; *Farrington v. Barr*, 36 N. H. 86; *Stucky v. Stucky*, 30 N. J. Eq. 546.

There is no pretense of a written declaration of trust by the grantees in favor of the grantor, and one by parol would be void: Code, sec. 1296.

There are therefore but two other grounds upon which the relief granted by the court below can be supported: 1. That the conveyance was procured by fraud or imposition practiced upon the grantor; 2. That the conveyance was made at the instance and procurement of one occupying a position of trust and influence, and that the grantees are volunteers.

On the first ground it is sufficient to say that the record is entirely free of evidence of any fraud against the grantor. The facts shown are, that she was the owner of the estate of her deceased father, one half of which came to her by descent and distribution, and the other by conveyance from her

mother, the widow. The intestate had been surety upon the official bond of an officer who had defaulted, and it was supposed by the administrator of the estate that a conveyance of the estate to third persons would be effectual to coerce a favorable compromise from the state, or would compel other sureties, who had made fraudulent conveyances of their estates to avoid liability on the bond, to contribute their proportions in payment of the default. At his suggestion and for these purposes the conveyance was made. Mrs. Moore took no part in the scheme other than to receive the conveyance, and the only fraud that can be imputed to her is, that she now declines to reconvey the property, as the administrator and the grantor in the deed thought she would do.

If this is such a fraud as will warrant the interposition of a court of chancery, the statute of frauds will be practically obliterated, since all parol contracts from which a trust would arise, if they were in writing, will be enforced upon the ground that it is a fraud not to comply with them.

We do not ignore or deny the proposition that a court of chancery will not permit a fraud to be consummated by reliance upon the statute of frauds; as where one takes an absolute conveyance of property which is intended as a mortgage, or takes advantage of a relation of trust or confidence, or by false representations or concealment, or by unfair devices or schemes, procures a conveyance to be made; or where advantage is taken of the mental infirmity of the grantor. These and other illustrations belong to a class of cases in which fraud (or, in the eye of a court of equity, its equivalent) co-exists with the conveyance, infects the conscience of the grantee, and disables him from asserting the validity of the instrument which is the foundation of his title, or from interposing the statute of frauds as a protection against his parol contract to convey. But such is not the case here. There is no fraud shown except that contemplated by the grantor in protecting the estate from the claim of the state. The manifest purpose of Mrs. Jordan was to make a conveyance that should convey her title, and she relied upon an implied promise to reconvey to her on demand. If this promise had been an express parol one, it would have been unenforceable because of the statute of frauds; it certainly cannot be stronger as an implied one. The danger which the statute of frauds intends to protect against is that of permitting titles held under solemn conveyances from being hampered, clogged, or destroyed by

oral evidence, by mere parol declarations or admissions, which are so easy of fabrication and so difficult to disprove. To secure against such danger, the law wisely provides that declarations of trust shall be made and manifested by a writing, and closes the doors of the courts to those who assert an equitable title resting wholly by parol. But courts do not permit one to lay a trap for another, and by fraudulent conduct inveigle him into a position in which this statute is fatal to him, and then avail of its protection. The case of *O'Connor v. Ward*, 60 Miss. 1025, illustrates the principle referred to. O'Connor, who was the confidential friend and adviser of the Wards, by false representations of the condition of the estate of which they were heirs, and by promising to hold the property to their use and benefit, procured absolute conveyances to be made by them. Having secured the property, he refused to reconvey or to execute the trusts he had agreed to assume. When suit was brought, he defended upon the ground that the conveyance was to defraud creditors, and also because there was no written declaration of trust. Under these circumstances, we held that he could avail of neither defense; that his title was procured by fraud upon the grantors, and therefore that the conveyance should be annulled. But that case is widely different from this, in that here there is no fraud in the procurement of the deed, no confidence abused, no position of trust perverted to obtain the deed. Without announcing an assent to the position of counsel for Mrs. Jordan, that the conveyance made by her was not a fraudulent one, because it could in no degree hinder, delay, or defraud the creditors of the decedent, whose debts became fixed upon it by his death, its correctness might be conceded without changing the result. The most that can be argued is, that the *mala mens* is not an obstacle to the relief she seeks. It certainly cannot be invoked as the foundation and root of an independent equity that would not spring from the transaction stripped of this element. What, then, is left to the complainant? Nothing but that she has made a voluntary conveyance to her daughter, who, because it is voluntary, is under an implied promise to reconvey the property, but refuses so to do. This is, we think, insufficient to entitle her to relief.

Nor do we think that relief should be afforded because the administrator, Grayson, suggested the scheme in pursuance of which the conveyance was executed. He got no benefit by it, nor was it intended that he should. It is true that Mrs. Moore

is a mere volunteer; but she is not a volunteer claiming under him, nor in a scheme concocted for his advantage. In the cases relied upon by counsel, and those therein referred to, some benefit passed to the confidential adviser or through him to another: *Rhodes v. Bate*, L. R. 1 Ch. App. C. 252; *Gresley v. Mousley*, 4 DeG. & J. 78; *Archer v. Hudson*, 7 Beav. 551; *Huguenin v. Baseley*, 14 Ves. 273; *Gibson v. Jeyes*, 6 Id. 266; *Dent v. Bennett*, 4 Mylne & C. 269; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Id. 58.

These were cases in which, without regard to *bona fides* of the person occupying the confidential relation, relief was afforded.

Where fraud on the grantor is perpetrated, those who acquire the benefit of the fraud, though not claiming through the confidential adviser, and though he secures no benefit to himself, have been decreed to make restitution: *Bridgman v. Green*, 2 Ves. Sr. 627.

But we have found no case from which it would follow that the conveyance here involved should be vacated. Grayson and Mrs. Jordan, for the purpose of consummating a scheme which they supposed would hinder, delay, and defraud creditors, selected Mrs. Moore as one of the persons to whom the conveyance should be made. His advice was, we may assume, implicitly followed as to the details by which the plan should be made effective; but that it was does not affect the validity of the conveyance as between grantor and grantee, nor commend the grantor to a more favorable consideration by a court of equity. On the whole record we see no reason why a court of equity should interfere to disturb the rights of the parties as fixed by the deed.

The decree will be reversed and cause remanded.

WHETHER TRUST RESULTS IN FAVOR OF GRANTOR IN DEED: See *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266, and note 270-277, discussing the subject.

NO USE RESULTS TO GRANTOR IN DEED EXPRESSING CONSIDERATION, THOUGH IT IS MERELY NOMINAL, and never paid, and parol proof that the conveyance was intended to be in trust for the grantor will not raise a trust: *Hogan v. Jaques*, 19 N. J. Eq. 123; 97 Am. Dec. 644.

GRANTOR IN DEED MAY RAISE TRUST IN FAVOR OF HIMSELF in California, though it recites the payment of a valuable consideration, if the grantee is his wife, and she procures the making of the conveyance by a parol promise to reconvey, which she made, intending to deceive him thereby: *Brison v. Brison*, 75 Cal. 525, *ante*, p. 189. The decision of the court was founded on sections 158 and 1572 of the Civil Code of the state; and unless justified by those sections, conflicts with the weight of authority elsewhere: See note to *Jackson v. Cleveland*, 90 Am. Dec. 270-277.

PARKER v. REDDICK.

[65 MISSISSIPPI, 242.]

BILL OF EXCHANGE OR CHECK SPECIFYING NO TIME OF PAYMENT is payable on demand.

PRESENTMENT FOR PAYMENT OF A BILL OR CHECK PAYABLE ON DEMAND must be within a reasonable time.

WHAT IS REASONABLE TIME WITHIN WHICH TO PRESENT BILL OR CHECK FOR PAYMENT is a question of law to be determined by the court when the facts are ascertained. Delay in such presentment cannot be reasonable if it is more than is fairly required in the ordinary course of business, without special inconvenience to the holder, or by the special circumstances of the case.

PRESENTMENT FOR PAYMENT WHEN THE DRAWEE OF A BILL LIVES IN A DIFFERENT PLACE FROM THAT IN WHICH IT IS DRAWN, and the instrument must be sent by mail for presentment, must be by mailing it the next day after it was received by the holder.

PAPER PAYABLE ON DEMAND MAY BE PUT IN CIRCULATION, but its ultimate presentment for payment cannot be delayed beyond a reasonable time by successive transfers, any more than it can by being locked up or held an unreasonable time by the first or any successive holder.

DELAY IN PRESENTING A CHECK FOR PAYMENT, THOUGH SUFFICIENT TO RELEASE THE INDORSER THEREOF, will not relieve the drawer from liability, unless he shows that he was injured thereby.

ACTION by Reddick against W. J. Parker and J. B. Snider, surviving partner of Snider and Son, based on the following writing:—

“BANKING HOUSE OF M. C. SNIDER AND SON.

“\$200. GRENADA, MISS., September 22, 1884.

“Pay to the order of W. J. Parker two hundred dollars.

“J. B. SNIDER, Cashier.

“To LATHAM, ALEXANDER, & Co., New York, N. Y.

“No. 50,665.”

This paper was, on the day of its date, bought by Parker from Snider and Son, and was by him indorsed and forwarded to F. M. Lamon, Brooksville, Florida. The latter, on the first day of October in the same year, indorsed it to Reddick, who two days later indorsed it to A. N. Chelf. Chelf, on October 13th, indorsed it to Hancock and Edrington. They indorsed it to Wiltz, Biddle, & Co., by whom it was indorsed to the Union Bank of Baltimore, which indorsed it to the Republic Bank of New York, which presented it for payment October 21, 1884. It was dishonored for want of funds; and was then protested, and notice forwarded to the several indorsers. Of these several indorsers, Reddick, Chelf, and Hancock and Edrington resided in Brooksville, and Wiltz, Biddle, & Co. in Baltimore. There

was a daily mail between Brooksville and New York, and the time required to transmit it was five days. Reddick paid the amount of the bill to his indorsee, and then brought this action. Verdict for the plaintiff on the second trial. Defendant Parker appealed.

W. C. McLean, for the appellant.

A. H. Whitfield, for the appellee.

ARNOLD, J. It is uncertain from the evidence whether the drawees of the instrument upon which appellants were sued were bankers or not; but whether the paper be called a check or bill of exchange, it expressed no time for payment, and was therefore payable on demand. A bill or check payable on demand must be presented for payment within a reasonable time. What constitutes reasonable time in such case is a question of law to be determined by the court when the facts are ascertained: *Baskerville v. Harris*, 41 Miss. 535.

No delay in making presentment of paper payable on demand can be termed reasonable, if it is more than is fairly required in the ordinary course of business, without special inconvenience to the holder, or by the special circumstances of the case: *Phoenix Ins. Co. v. Gray*, 13 Mich. 191. Such paper contemplates immediate payment. It cannot be said that it is intended for circulation. One who holds a bill or check payable on demand beyond the time necessary in the usual course of business for its presentation for payment does so at his peril. The general rule derived from the authorities, but subject to modification by special circumstances, is, that if the drawee of such paper resides in a different place from that in which it is drawn, and the instrument must be sent by mail for presentment, it must be mailed on the day next after that on which it was received by the holder: 1 Daniel on Negotiable Instruments, sec. 605; 2 Id., secs. 1586, 1592; Byles on Bills, 7th Am. ed., 211-213; Chitty on Bills, 13th Am. ed., 433; *Fortner v. Parham*, 2 Smedes & M. 151.

Paper payable on demand, while not commonly intended for that purpose, may be put into circulation; but its ultimate presentment for payment cannot be delayed beyond a reasonable time by transfer or successive transfers, any more than it can by being locked up or held an unreasonable time by the first or any subsequent holder: Chitty on Bills, 13th Am. ed., 430; 2 Daniel on Negotiable Instruments, sec. 1595; Story on Promissory Notes, sec. 494.

If the paper sued on be regarded as a bill, the drawer, as well as the indorsers, would be discharged by the negligence and delay in respect to the presentment; but if a check, indorsers would be discharged by such laches, while the drawer would not, unless he could show that he was injured by the default. He would be entitled only to such presentment and notice as would save him from loss: 2 Daniel on Negotiable Instruments, sec. 1587.

No excuse is shown by the record for the delay which intervened in presenting the paper in question for payment, and the loss thereby occasioned cannot be imposed on the indorser Parker. As to him, the last verdict was contrary to the law and the evidence. The court below erred in instructing the jury that the presentment was made within a reasonable time, and in refusing to instruct the jury to the contrary. The judgment is affirmed as to the drawer Snider, who made no defense below, and assigns no error here; but it is reversed as to the indorser Parker, and the last verdict as to him is set aside, and the first verdict as to him is restored, and judgment rendered thereon here in his favor.

NEGOTIABLE INSTRUMENT—INDEFINITE TIME OF PAYMENT: See *Mattison v. Marks*, 31 Mich. 421; 18 Am. Rep. 197; *Ernst v. Steckman*, 74 Pa. St. 13; 15 Am. Rep. 542; *Walker v. Woollen*, 54 Ind. 164; 23 Am. Rep. 639; *White v. Smith*, 77 Ill. 351; 20 Am. Rep. 251.

NEGOTIABLE INSTRUMENT—LACHES IN PRESENTMENT, EFFECT OF: *Adams v. Derby*, 28 Mo. 162; 75 Am. Dec. 115, and note 118; *Crim v. Starkweather*, 88 N. Y. 339; 42 Am. Rep. 250; *Thielman v. Gueble*, 32 La. Ann. 260; 36 Am. Rep. 267.

DELAY IN PRESENTING CHECK FOR PAYMENT IS IMMATERIAL unless it injures the drawer: *Compton v. Gilman*, 19 W. Va. 312; 42 Am. Rep. 776.

NEGOTIABLE INSTRUMENT WHICH STATES NO TIME OF PAYMENT IS PAYABLE ON DEMAND: *Converse v. Johnson*, 146 Mass. 20.

PRESENTMENT OF PROMISSORY NOTE FOR PAYMENT.—Presentment for payment after due must be made in a reasonable time, and what is a reasonable time is generally a mixed question of law and fact; but where the material facts are admitted, or are not in dispute, it is a question solely for the court: *Bassenhorst v. Wilby*, 45 Ohio St. 333.

LEWIS v. SEIBLES.

[65 MISSISSIPPI, 251.]

DESCRIPTION.—**TAX DEED NEED NOT STATE THE COUNTY OR STATE** in which lands are situate, when it describes them by section, subdivision of section, township, and range. It will be presumed that the tax collector did not violate his official duty by selling lands beyond the county in which he was authorized to act.

STATUTE OF LIMITATIONS AGAINST A TAX TITLE.—Section 539 of the code of Mississippi, declaring that three years occupation under a tax title shall bar any suit to recover the land, does not protect one who has a tax title, as against a subsequent tax sale and deed of the same lands.

EJECTMENT by Seibles against Lewis. Both parties claimed under tax sales and deeds, the plaintiff under a deed executed in 1875, and the defendant under deeds of prior date. The plaintiff's deed was made by the tax collector of Lincoln County, Mississippi, and described the land as "east half of south-east quarter, section 4, township 5, range 2, east," without naming any county or state. Defendant moved to exclude this deed because of this defect in the description. The motion was overruled. The defendant offered to show that he had been in adverse possession of the land for more than three years since the code of 1880 went into effect, and claimed that the evidence offered was material under section 539 of the code of 1880, which reads as follows: "Actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax collector, in pursuance of a sale for taxes, shall bar any suit to recover such land or assail such title because of any defect in the sale of such land for taxes, or in any precedent step to said sale, saving to minors and persons of unsound mind the right to bring any suit within such time, after the removal of their disabilities, and upon such terms as is provided for the redemption of land by such persons." The court refused to receive this evidence, and gave judgment for plaintiff. Defendant appealed.

H. Cassedy, for the appellant.

R. H. Thompson, for the appellee.

CAMPBELL, J. In *Hanna v. Renfro*, 32 Miss. 125, it was decided that a tax collector's deed which designated the section, township, and range, but not the county or state, in which the land lay, was not void for uncertainty of description, and it was said in the opinion in that case that "it was but a latent ambiguity, which was susceptible of explanation." In our

view, such a deed does not present any ambiguity at all. There is no other land to which it could be applied than the particular section in the county in which the grantor was tax collector. The deed is a nullity as to land out of the county, and it is not suggested that in the county there are several parcels of land to which the description in the deed can be applied. Since there are not several tracts of land to which the description in the deed could apply, there is not a latent ambiguity. Besides this, the tax collector is confined to the county in selling land. He cannot sell land in any county except that for which he is collector. He can sell only such land as has been assessed and is delinquent. The assessment roll is required to contain only lands in the county. The presumption of the performance of official duty by the officers charged with the assessment and collection of taxes should be indulged, and is sufficient to supply the county and state when omitted from a tax collector's deed.

The deeds offered in evidence by the defendant, in connection with a proposal to show actual occupation under them for three years after the code of 1880 became operative, were properly excluded. The purpose of this offer was to invoke section 539 of the code. But it had no application. The plaintiff did not seek to recover the land or assail the title of which the defendant sought to avail because of any defect in the sale for taxes or in any precedent step to such sale. The plaintiff claimed to have acquired the very title which the defendant invoked. To show that title to be good did not help the defendant or harm the plaintiff, who had acquired it by subsequent proceedings.

Affirmed.

TAX DEED, WHEN VOID FOR UNCERTAINTY IN DESCRIPTION OF PROPERTY: *Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738, and note 747; *Carncross v. Lykes*, 22 Fla. 587; *Hershey v. Thompson*, 50 Ark. 484; *Cadwalader v. Nash*, 73 Cal. 43; *Henderson v. White*, 69 Tex. 103.

POWER OF LEGISLATURE TO MAKE TAX DEEDS PRIMA FACIE OR CONCLUSIVE EVIDENCE, ETC.: *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182, and note 187-189.

EVERY PURCHASER AT TAX SALE TAKES HIS DEED SUBJECT TO CONDITION that tax has not been paid; and if his title is defeated, he must look to the government for that relief which such a case may require: *Wallace v. Brown*, 22 Ark. 118; 76 Am. Dec. 421.

REBER v. DOWLING. DOWLING v. REBER.

[65 MISSISSIPPI, 259.]

DESCRIPTION IN TAX DEED of "one lot, and the dwellings thereon, southwest corner of Franklin and Pine streets," accompanied by a statement that the property was assessed to Thomas J. Dowling, must be regarded as sufficient, if it appears from other evidence that the only property assessed to him was in the city of Natchez, on the two streets named, and an accurate description of the property so assessed is proved.

DEVISE TO SEVERAL PERSONS EQUALLY, AND WHEN EITHER DIES HIS SHARE TO BE DIVIDED AMONG THE REST, vests the property in the devisees as tenants in common, with cross-remainders between them, and the ultimate limitation to the last survivor. The heirs of the devisees other than of the last survivor acquire no title to the property.

BILL by Reber to confirm a tax title. Thomas J. Dowling and Teresa A. Cullen and her children were made defendants. Emma V. Cullen and Rosa F. Cullen were admitted to defend, and sought to redeem. The certificate of sale issued to Reber, and upon which he relied, was as follows: "The state of Mississippi, Adams County. I, James W. Lambert, sheriff and tax collector in and for said county, do hereby certify that the following is a true and correct list of lands sold to the state of Mississippi on the first Monday, the sixth day, of March, 1882, for delinquent taxes due thereon for the fiscal year 1881, pursuant to the requirements of law." The list here referred to described property, claimed to be that in controversy, as "one lot, and the buildings thereon, southwest corner Franklin and Pine streets," and stated that the property was assessed to Thomas J. Dowling. In April, 1887, Reber purchased of the state, and received a deed, in which the description conformed to that in the list. To remove the apparent ambiguity in the descriptive parts of the list and deed, evidence was offered and received to the effect that the property had been assessed to Dowling alone; that no other property was assessed to him in Adams County; that that assessed was in the city of Natchez; that there were no streets in Adams County named Franklin and Pine, except two in the said city, and that the correct and accurate description of the property was known. Confirmation was granted as against the undivided one half claimed by Dowling, but Reber was ordered to quitclaim the other half to Teresa A., Emma V., and Rosa G. Cullen, on payment of one half of the amount due on the whole property. The persons last named were the widow and children of John B. Cullen, deceased. The property had, in the year 1855, been devised by its then owner to W. F. Cullen, John B. Cul-

len, Thomas J. Dowling, and Annie C. Dowling, "each to have an equal share of that property, but is never to be sold, and when either dies, then for his or her share to be equally divided among the rest." All the devisees other than Thomas B. Dowling were dead. The court was nevertheless of the opinion that the heirs of John B. Cullen had an interest in the property equivalent to an undivided one half, which they were entitled to redeem. All the defendants, as well as the complainant, appealed.

R. E. Connor, for the appellant and cross-appellee.

T. J. Carson, and Calhoon and Green, for the appellees and cross-appellants.

CAMPBELL, J. All uncertainty as to the description of the lot was removed by the evidence.

By the will of Thomas Dowling, the title of the lot was vested in the four devisees and tenants in common, with cross-remainders between them, and the ultimate limitation to the last survivor. On the death of each, the estate vested in the survivors, and not in the heirs of the decedent. Therefore the whole estate, on the death of the other three devisees, vested in Thomas J. Dowling, and the children of John Belzer Cullen, one of the devisees, deceased, never had any estate in the land or right to redeem it. The decree should have been for the confirmation of complainant's title to the whole, and not merely the half-interest.

Reversed, and decree here as indicated.

The meagerness of the foregoing opinion in treating the first point decided leaves us in doubt whether the court considered the description in the tax deed sufficient, according to legal principles generally prevailing, or as being made sufficient by the statutes of that state. The counsel for the complainant relied very confidently on the provisions of section 491 of the code of Mississippi, edition of 1880. So far as material, they are as follows: "Parol testimony shall always be admissible to apply a description of land on the assessment roll, or in a conveyance for taxes, where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land by the aid of such testimony."

TAX DEED, SUFFICIENCY OF, as to recitals and matter of description: See *State v. Winn*, 19 Wis. 304; 88 Am. Dec. 689; *Long v. Burnett*, 13 Iowa, 28; 81 Am. Dec. 420; *Moss v. Shear*, 25 Cal. 38; 85 Am. Dec. 94; *Pleasants v. Scott*, 21 Ark. 370; 76 Am. Dec. 403.

DEVISE TO CLASS AS TENANTS IN COMMON, EFFECT OF DEATH OF ONE OF: See *Cureton v. Massey*, 13 Rich. Eq. 104; 94 Am. Dec. 152, note 156; *Sinton v. Boyd*, 19 Ohio St. 30; 2 Am. Rep. 369.

McMASTER v. ILLINOIS CENTRAL R. R. Co.

[65 MISSISSIPPI, 264.]

FELLOW-SERVANTS, WHO ARE. — When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in doing his, then they are engaged in the same common business; and being subject to the control of the same master, they are fellow-servants, no matter how different the grades of service or compensation, or how diverse or distinct their duties may be.

FELLOW-SERVANTS. — To ENTITLE SERVANT TO RECOVER FOR THE NEGLIGENCE OF HIS FELLOW-SERVANT, it must be shown that the latter was incompetent, and was selected without reasonable care and prudence, or was continued in service after the master knew of his unfitness.

CONFLICT OF LAWS. — LAW OF THE PLACE WHERE AN INJURY WAS RECEIVED by one servant through the negligence of another servant of the same master must prevail in an action for such injury, though brought in another state, whose laws upon this subject are different.

FELLOW-SERVANTS. — BRAKEMAN OF A FREIGHT TRAIN AND THE CONDUCTOR AND OTHER EMPLOYEES OF A PASSENGER TRAIN of the same railroad company are fellow-servants.

ACTION by Mrs. McMaster for damages suffered by the killing of her son. He was a brakeman in the employ of the defendant. His death occurred in the state of Louisiana, and the complaint charged that it was the result of the negligence of the conductor and other employees of the defendant, who were in charge of a passenger train, while the decedent was brakeman on a freight train. Demurrer to the complaint was sustained. Plaintiff appealed.

L. B. Harris, for the appellant.

W. P. and J. B. Harris, for the appellee.

ARNOLD, J. If a brakeman on one train of a railroad company is the fellow-servant of the employees in charge of or operating another train of the same company on the same road, the declaration was demurrable.

There is some diversity of authority as to who are fellow-servants within the meaning of the rule which exempts the master or employer from liability to those engaged in his employment, for injuries suffered by them, as the result of the negligence or misconduct of other servants employed by him and engaged in the same common business; but subjection to control and direction by the same common master in the same common pursuit furnishes the true test of co-service. When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the

negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business; and being subject to the control of the same master, they are fellow-servants, within the generally accepted meaning of the rule, no matter how different the grades of service or compensation may be, or how diverse or distinct their duties may be: 3 Wood's Railway Law, 1494 et seq.

And when the relation of fellow-servants is established, there can be no recovery from the common master or employer by one of them for an injury occasioned to him through the negligence or misconduct of his co-employee. In order to render the master liable in such case, it would be necessary to show that the negligent servant was incompetent, and that he was selected without reasonable care and prudence, or that he was continued in the employment after notice to the master of his unfitness, or that the master had failed to furnish adequate means and materials for the work. Such is the law of this state, and such is the law as it has generally prevailed in America and England for many years: *N. O. etc. R. R. Co. v. Hughes*, 49 Miss. 258; *Chicago etc. R. R. Co. v. Doyle*, 60 Id. 977; *Louisville etc. R. R. Co. v. Conroy*, 63 Id. 562; 56 Am. Rep. 835; *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478; *Murray v. S. C. R. R. Co.*, 1 McMull. 385; 36 Am. Dec. 268, and note; 3 Wood's Railway Law, 1494 et seq.

For the purposes of this case, it is not necessary to collect more of the numerous decisions, English and American, on the subject; that is well done in the three authorities last above cited.

The doctrine in question was first asserted by the supreme court of South Carolina in 1841, in *Murray v. S. C. R. R. Co.*, 1 McMull. 385; 36 Am. Dec. 268. It may well be termed the South Carolina doctrine: *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377; *Murray v. S. C. R. R. Co.*, 1 McMull. 385; 36 Am. Dec. 268, and note.

The reason upon which it is based cannot be better stated than by quoting from the opinion of the supreme court of Massachusetts in *Farwell v. Boston and Worcester R. R. Co.*, 4 Met. 49, 38 Am. Dec. 339, which has long been considered a leading case both in this country and England. Chief Justice Shaw, in delivering the judgment of the court, said: "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services for

compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes; but whether he is responsible, in a particular case, for their negligence is not decided by the single fact that they are for some purposes his agents. . . . In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. . . . We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer. . . .

"It was strongly pressed in the argument that although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a dis-

tance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, How near or how distant must they be to be in the same or different departments?

“ Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master in the case supposed is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant.”

But the injury complained of in this case having occurred in Louisiana, the rights and liabilities of the parties in relation to it are governed by the laws of that state: *Chicago etc. R. R. Co. v. Doyle*, 60 Miss. 977. We find that the law of Louisiana on the subject is different from that of Mississippi and most of the other states of our Union. In *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 630, 55 Am. Rep. 508, and in *Van Amburg v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517, the supreme court of that state approves and adopts the doctrine announced by the supreme court of the United States in

Chicago etc. R. R. Co. v. Ross, 112 U. S. 377. But this does not change the legal aspects of the case at bar. Four of the judges of the supreme court of the United States dissented in the case referred to, and the decision of the majority is contrary to the general course of judicial opinion in this country and in England; and it does not go further than to hold that the conductor of a railway train who commands its movements, and controls the employees upon it, is not the fellow-servant of the other employees on that train, but is the vice-principal representing the company, and that the company would be liable for a negligent act of his which resulted in injury to another employee on the train. On the authority of that case, the conductor, while not the fellow-servant of other employees on the train subject to his direction and authority, might well be, and under the law as it is generally understood and interpreted would be, the fellow-servant of other employees of the company in the same common business over whom he had no supervision or control.

It follows, from what has been said, that the brakeman on the freight train and the employees in charge of the passenger train were fellow-servants, and that the action of the court below in sustaining the demurrer to the declaration was free from error.

Affirmed.

FELLOW-SERVANTS, WHO ARE: *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663, and note 664. Conductor and brakeman on a railway train are fellow-servants: *Brown v. C. P. R. R. Co.*, 72 Cal. 523; but see *L. & N. R. R. Co. v. Moore*, 83 Ky. 675; while the engineer and brakeman on the same railway train are not fellow-servants in the sense of co-equals: *L. & N. R'y Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135, and note 142; *E. T. & W. N. C. R. R. Co. v. Collins*, 85 Tenn. 227; nor are train-dispatchers fellow-servants with those engaged in operating and moving trains: *Smith v. W. St. L. & P. R'y Co.*, 92 Mo. 359; but a brakeman and car-inspector are fellow-servants in the same circle of employment: *Philadelphia etc. R'y Co. v. Hughes*, 119 Pa. St. 301. The foreman of a mine has been held to be a fellow-servant with miners employed to work under his directions, and the owner of the mine not to be liable for injuries caused to the latter through the foreman's negligence, unless he failed to use ordinary care in the selection of the foreman: *Stephens v. Doe*, 73 Cal. 26.

CIRCUMSTANCES UNDER WHICH EMPLOYEE MAY RECOVER for injury caused by negligence of co-employee: *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92, and see cases collected in note 106, bearing on negligence of fellow-servants; *Webb v. R. & D. R. R. Co.*, 97 N. C. 387.

CONFLICT OF LAWS. — Action for injuries occasioned out of the state: *Le Forest v. Tolman*, 117 Mass. 109; 19 Am. Rep. 400; and see *Davis v. New York etc. R. R.*, 143 Mass. 301; 58 Am. Rep. 138, and note 143.

ANDRE v. MORROW.

[65 MISSISSIPPI, 315.]

RECOUPMENT. — IN AN ACTION ON A PROMISSORY NOTE, THE DEFENDANT may plead, by way of recoupment, that the note was given under a contract, by the terms of which the payee was to furnish wagons to be sold by the maker on commission, and was not to sell, nor furnish to be sold, any other wagons to any other dealer in the same town, and that the plaintiff, after furnishing wagons to the defendant, and receiving therefor the note in suit, violated his agreement by furnishing wagons to other dealers, whereby defendant was prevented from selling the wagons furnished him at any profit. The commissions for selling may furnish a criterion for estimating damages sustained by the defendant.

ASSUMPSIT on a note made by Andre. He pleaded that the note was given under the circumstances stated in the *syllabus*. Demurrer to his plea was sustained, and judgment was given to the plaintiff. Defendant appealed.

H. C. Conn, for the appellant.

H. Cassedy, and Nugent and McWillie, for the appellee.

CAMPBELL, J. The demurrer to the last plea of the defendant should have been overruled. The contract averred by it was not an independent one, so disconnected with the note sued on as to debar the defendant from recouping damages. The breach and damages occurred subsequent to the making of the contract, of course; but that is no reason for denial of the right of recoupment.

It is impossible to affirm that the defendant did not sustain damages capable of ascertainment, and of a character recognized by law, resulting from the breach of the contract alleged by the plea. It is not necessary to consider of speculative profits. There may be a legitimate basis for estimating damages. If there was such a contract as averred, and its breach, and Andre, in consequence, sold the wagons at cost, the commissions for selling as he had before done may furnish a criterion for estimating damages. The substantial sufficiency of the plea is the only question raised by the demurrer or considered by us.

Reversed, demurrer to plea overruled, and cause remanded for further proceedings.

COUNTERCLAIM, AND WHAT DEMANDS MAY BE SUBJECT OF: See *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477, and note 482-492; *Schwoeickhart v. Stuewe*, 71 Wis. 1; 5 Am. St. Rep. 190.

DAMAGES FOR FAILURE TO EXECUTE OR FOR DELAY IN EXECUTING a contract at the time stipulated may be recouped in an action to recover the contract price: *Abbot v. Gatch*, 13 Md. 314; 71 Am. Dec. 635, and note 644; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Hill v. Southwick*, 9 R. I. 299; 11 Am. Rep. 250.

HAFTER v. STRANGE.

[65 MISSISSIPPI, 323.]

POSSESSION AS NOTICE OF EQUITABLE TITLE. — IF GRANTOR REMAINS IN POSSESSION, this is not sufficient, as against his recorded deed, to put intending purchasers on inquiry to ascertain whether the deed was fraudulent, or whether the grantor retains any interest in the land.

ESTOPPEL — LACHES. — GRANTOR WHO CLAIMS THAT A DEED SIGNED BY HIM WAS PROCURED BY FRAUD, and who knows that the grantee is trying to sell the property, but remains inactive until after a sale thereof is effected, is estopped from maintaining an action against an innocent purchaser to vacate the deed, though he (the grantor) has remained in possession.

BILL in equity to vacate a conveyance on the ground that it was procured by fraud. Decree for complainant. Defendant appealed.

Woods, McIntosh, and Williams, for the appellants.

M. H. Whittaker and W. H. Ethridge, for the appellee.

COOPER, C. J. The appellee was the owner of block 4 in the town of Meridian, and sold and conveyed two small lots thereof to other persons, who caused their deeds to be recorded, and entered into possession of the lots. After this she conveyed to her grandson, Peter Shearer, all of block 4, reciting the consideration of the conveyance to be "natural love and affection and the sum of one dollar." Shearer at once recorded his deed, and three days after its execution, sold to the appellants a large part of the block, including a part of one of the lots previously conveyed by the appellee to other parties.

After the conveyances had been executed by Shearer to appellants, and after they had paid the purchase price, the appellee exhibited the bill in this cause against Shearer and appellants to vacate and annul the conveyance made by her to him, and those made by him to appellants. The bill charges that the complainant is very old, feeble, and weak of mind; that Shearer is her grandson, who had lived with her, and in whom she reposed confidence; that he represented to her that

he would soon be married, and desired to build him a house on a part of the land; that appellee, moved by affection for him, agreed to give him a small lot upon which to build, and Shearer undertook to have a proper deed prepared for execution; that he falsely and fraudulently caused a deed to be prepared conveying the whole block; that appellee, being unable to read or write, did not discover the fraud, but executed the deed, supposing it to convey only the small parcel of land she intended to give to Shearer; that she has, from the date of the execution of the deed, remained in the actual, adverse, notorious, and exclusive possession of all the block except that previously conveyed by her to other parties, claiming the same as her own; that appellants were chargeable with notice of her rights in the premises by reason of her occupancy, and that the exercise of reasonable diligence on their part would have led to a discovery of the fraud which had been perpetrated on her by Shearer; that appellants did not pay the fair market price for the land bought by them; the fact that Shearer was willing to sell at the price obtained should have admonished them of some defect in his title or right to the property. Shearer made no defense, and the bill was taken as confessed as against him. The appellants answered, denying all knowledge of the facts attending the conveyance to Shearer; they averred that they examined the records, and finding a properly executed deed to him from appellee, relied upon the same as evidence of his title; that they paid a reasonable value for the property without any suspicion of the fairness of the conveyance under which he held. They deny actual knowledge of the fact of complainant's occupancy, and deny any information of any fact imposing upon them any duty to make any inquiry other than that of the existence of Shearer's recorded title.

On final hearing, the court made a decree in accordance with the prayer of the bill, and canceled the deed from complainant to Shearer and from him to appellants. From this decree the purchasers from Shearer alone appeal.

Without a review of the evidence in detail, we think it sufficient to say that the price paid by appellants was not so grossly inadequate to the value of the property as to warrant the presumption of bad faith on the part of the purchasers, nor to suggest to them a defect in the title of their vendor. The witnesses vary greatly in the estimate put by them on the property. Some of them say that it was worth several times the

purchase price; but on the other hand, other witnesses, with equal information on the subject, affirm that the price paid was the full value of the land, and some of them are of opinion that the price was in excess of its value. Since the purchase was made, land in that vicinity has rapidly increased in value. But at the time of the purchase the block in controversy was remote from the town, and not approached by any streets that were kept in repair by the town authorities. From an examination of these facts, and from argument of counsel, we assume that the point of decision in the lower court was that complainant's possession was notice of her claim to all persons who should buy it, and that appellant's title was in subordination to whatever right the occupier might assert against Shearer, who held the legal title.

While the general rule that possession of land by one claiming some interest therein is notice to the world of the character and extent of that claim has been frequently recognized by the decisions of this court, it has never been held that such possession is notice of claim as against the recorded conveyance by the occupant. Certainly a solemn deed is the equivalent of an assertion by the party grantor that the title is in the grantee; its purpose is to convey and show title, and he who thereby invests another with this universally recognized evidence of right ought not, as against one who deals with that other upon the faith of such evidence, to be permitted to aver to the contrary to his injury. That the complainant was deceived and defrauded by her grandson may be sufficient to entitle her to relief as against him, and those holding under him as volunteers or with notice of fraud; but this is because her equity is superior to the right asserted against it. But the principle upon which relief is granted in such case finds no place in a controversy with others whose right is as equitable as hers, and who have acquired those rights upon the faith of her deed. The decisions are in conflict upon the question involved. In support of the conclusion we have reached are *Bloomer v. Henderson*, 8 Mich. 395; 77 Am. Dec. 453; *Woods v. Farmere*, 7 Watts, 382; 32 Am. Dec. 772; *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508; *Dawson v. Danbury Bank*, 15 Mich. 489; *Newhall v. Pierce*, 5 Pick. 450; *Rice v. Rice*, 2 Drew. 73; *White v. Wakefield*, 7 Sim. 401; *Muir v. Jolly*, 26 Beav. 143; *Cook v. Travis*, 20 N. Y. 400; *Van Keuren v. Cent. R. R. Co.*, 38 N. J. L. 165. On the other side are *Eylar v. Eylar*, 60 Tex. 315; *Pell v. McElroy*, 36 Cal. 268; *Ill. Cent.*

R. R. Co. v. McCullough, 59 Ill. 166; *Wright v. Bates*, 13 Vt. 341; *Webster v. Maddox*, 6 Me. 256; *Hopkins v. Garrard*, 7 B. Mon. 312.

If there could be any doubt (as we think there cannot be) of the applicability of the doctrine of estoppel because of the recorded deed alone, there are other facts disclosed by the testimony of complainant herself that would imperatively demand its enforcement against her. It appears that Shearer had offered the land for sale to one Wilson, who went on the place to examine it, and asked complainant if she had conveyed it to Shearer. She denied that she had done so, and was at once informed that Shearer had a conveyance from her by which the whole block was conveyed. With this notice it was incumbent upon her to take steps against the fraudulent grantee, who, she knew, was attempting to find a purchaser for the property, in order that an innocent purchaser might not be drawn into his toils. Having failed to act when action would have availed, she cannot now complain, nor shift the loss that has ensued upon others. The decree must be reversed, in so far as it directs cancellation of the deed from complainant to Shearer to the extent that appellants' lands are thereby conveyed, and in so far as it cancels the deeds made by Shearer to them.

POSSESSION OF LAND AS CONSTRUCTIVE NOTICE OF TITLE: See *Bloomer v. Henderson*, 8 Mich. 395; 77 Am. Dec. 453, and cases collected in note 459; *Gill v. Hardin*, 48 Ark. 409.

ACTUAL NOTICE OF FACTS, WHEN ONE IS CHARGEABLE WITH: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295, and cases collected in note 300.

ONE WHO STANDS BY AND SUFFERS ANOTHER TO PURCHASE AND SPEND MONEY on his land, under an erroneous opinion of title, cannot afterwards assert his legal right against such person: *Alabama etc. R. R. Co. v. South and North etc. R. R. Co.*, 84 Ala. 570; 5 Am. St. Rep. 401, and cases collected in note 412. When one who is negotiating a purchase with the holder of an absolute deed for land informs the maker of the deed, who is in possession, of his intention to purchase, and the latter asserts no interest or equity in it, he is estopped to set up after the purchase that the deed was intended by the parties merely as a mortgage: *Gill v. Hardin*, 48 Ark. 409; and if the owner of realty, whether he has the legal title in him or not, permits such realty to be sold in his presence by one who claims the power and authority to sell the same, and does not then assert his claim, but stands by and permits an innocent purchaser to buy such land, he is estopped thereafter from claiming such land of such purchaser because the vendor had no authority to sell the realty: *Stone v. Tyree*, 30 W. Va. 687.

BROWN v. NORMAN.

[65 MISSISSIPPI, 369.]

RESCISSION — RESTORING CONSIDERATION AND PLACING PARTIES IN STATU QUO. — In an equitable action for rescission of a contract on the ground of fraud, it is not indispensable that the complainant be able to place the defendant *in statu quo* in those cases where it would not be inequitable to permit a rescission without so doing. Hence where a member of an insolvent firm by false and fraudulent representations induced a stranger to purchase an interest in such firm and to become a partner therein, and the firm was subsequently declared insolvent and its assets put into the hands of a receiver, it was adjudged that a court of equity would decree a rescission of the sale, though it was impossible to place the parties *in statu quo*.

RATIFICATION OF CONTRACT INDUCED BY FRAUDULENT REPRESENTATIONS WILL NOT BE INFERRED from delay in seeking its rescission, when the injured party had no knowledge of the fraud practiced on him; and when his delay was the result of his misplaced confidence in the false statements made to him.

BILL to cancel a conveyance. Demurrer interposed and overruled, and defendant appealed.

R. H. Thompson, for the appellant.

A. H. Longino and A. C. McNair, for the appellee.

COOPER, C. J. The appellee exhibited his bill in the chancery court of Lawrence County, to cancel a conveyance of certain lands and personalty made by him in October, 1885, to the appellant, on the ground that it was procured by fraud and deceit. The defendant demurred to the bill, and his demurrer being overruled, he appealed.

It appears by the bill, that prior to October, 1885, the appellant was a member of the firm of Mangum, Brown, and Butler, doing business in the town of Wesson, in Copiah County. At that time the said firm was insolvent, owing debts to the amount of twelve thousand dollars, and having assets only to the value of five thousand dollars. A day or two before the bargain between appellee and appellant, Brown and Mangum went from the town of Wesson to the residence of appellee, which was some ten miles in the country, and proposed to him to purchase Brown's interest in said firm, representing to him that the firm was in a solvent and prosperous condition, and that its total liabilities did not exceed four thousand dollars, while its assets were not less than sixteen thousand dollars, and exhibited to him false and fraudulent statements, which they had prepared for the purpose of deceiving him as to the

condition of the firm. The appellee was a farmer, having no knowledge of mercantile affairs, and believing Brown and Mangum to be honest and truthful men (he having known them for many years), relied upon the representations and bargained for Brown's interest in the firm, giving him in exchange therefor his farm and the personal property thereon (at the valuation of three thousand one hundred dollars), and paying in cash five hundred dollars, and made a deed conveying the property to Brown.

In addition to the price paid by appellee, he assumed liability for the existing debts of the firm. After this contract had been made, the name of the firm was changed to Mangum, Butler, & Co., the appellee being the Co. The new business was carried on until March, 1886, at which time, Mangum, at the instance of the creditors of Mangum, Brown, and Butler, exhibited his bill in the chancery court of Copiah County for the dissolution of the firm and administration of its assets, on the ground of the insolvency of said firm of Mangum, Brown, and Butler. On his petition, a receiver was appointed, who took possession of the entire assets, and applied them, under the direction of the court, to the payment of the debts of the said firm, there being an insufficient amount to pay the debts in full. The bill charges that the appellee did not discover the insolvency of the firm of Mangum, Brown, and Butler until "shortly before" Mangum instituted his proceedings for dissolution and administration. The bill in this cause was exhibited in August, 1886, more than five months after the appointment of the receiver in the proceedings instituted by Mangum.

The complainant stated in his bill that by reason of the proceedings by Mangum, and the administration of the firm assets by the chancery court, he could not offer to restore the defendant to the position he had occupied before the contract was made; but that in fact the property had been applied as the rights of the other partners required, and as was contemplated by the contract between the complainant and defendant.

The grounds of demurrer are: 1. That since the *status quo* cannot be restored, a rescission cannot be decreed, but that complainant must resort to an action at law for the deceit practiced upon him; 2. That complainant, having failed to rescind presently upon the discovery of the fraud, ratified and affirmed the contract; 3. That complainant, having failed to

promptly notify the defendant of the proceedings by Mangum, and by permitting the property to be administered in a suit to which he was a party, affirmed the contract; 4. That complainant, having access to the books of the firm, and the opportunity of discovering the fraud, was guilty of negligence and laches in not having pursued his inquiries within a short time after the sale, and must be treated as having known of the fraud at the time when, by diligence, he might have discovered it, and that by remaining in possession after that time he affirmed the contract.

It will be noticed that the objections to the relief asked resolve themselves into two classes: 1. That there can be no rescission, because the *status quo* cannot be restored; and 2. That the conduct of the complainant, after he knew or should have known of the fraud, is, in law, a ratification of the contract.

In decisions in actions at law arising from attempted rescissions of contracts for the sale or exchange of personal property, the language of the courts is almost uniform in declaring that the defrauded party, in order to maintain his suit, must have restored or tendered to restore whatever was received by him under the contract, because of the principle that the contract must be rescinded *in toto* if at all, the plaintiff not being permitted to retain a benefit under an indivisible contract which he repudiates. But even in actions at law there are exceptions to the rule. If the thing received by the defrauded party be of no value (*Fitz v. Bynum*, 55 Cal. 459), or if, by reason of the act of the fraudulent party, a return be rendered impossible (*Masson v. Bovet*, 1 Denio, 69; 43 Am. Dec. 651, and notes; *Hammond v. Pennock*, 61 N. Y. 145), a return or tender is unnecessary.

So, also, where by natural causes or reasonable use the value of the property is diminished, and perhaps where it is necessarily destroyed in discovering the fraud, the fraudulent party must receive it in its depreciated condition: *Baker v. Lever*, 67 N. Y. 304; 23 Am. Rep. 117; *Gatling v. Newell*, 9 Ind. 574.

And if the *bona fide* buyer has expended work, money, or material in the improvement of the property before discovering the fraud, he may restore the property, and recover for the work and labor, money or material, put upon it: *Farris v. Ware*, 60 Me. 482.

In the two latter classes of cases there is a restitution of the thing itself to the fraudulent seller, but the *status quo* is not

restored; for in the one case he receives the property back less valuable than it was, and in the other, he takes it improved in value, but possibly improved in a manner or to an extent he would not have desired, but he is nevertheless chargeable with the value of improvement.

In many of the cases for rescission in equity, language is used from which it might be inferred that precisely the same principles govern in suits in equity that are applied to determine the right of the party to sue at law. In actions, whether at law or equity, usually both of the questions presented by this record are involved, viz., whether there had been a restoration of the *status quo*, and whether there has been ratification by the plaintiff after knowledge of the fraud. It is evident that ratification goes to the very root of the controversy, and if that be shown, whether in a court of law or of equity, the plaintiff must fail. It is therefore true that in investigating and determining that question the rule should be the same in equity as in law. But there is this marked distinction between suits at law for the recovery of the consideration paid, after rescission by plaintiff, and bills in equity for rescission. The plaintiff at law must have the legal title to the thing sued for, if it be a chattel, or a legal right to the sum demanded at the time of the institution of his suit. If he has parted with his property by reason of the fraud of the buyer, or if, being buyer, he had parted with his money by reason of the fraud of the seller, the legal title or right has passed out of him and into the other party. The contract is not void, but voidable only, and it must be avoided to reinvest him with his legal title or right to sue. Since the law permits him to reacquire this legal right by his own act, it puts upon him the necessity of restitution of the thing received by him as a condition of the exercise of the right to avoid the contract. From necessity, the law knows nothing of compensation, but requires restoration of the thing received; for to permit the plaintiff to determine what would be just compensation would be to make him judge in his own case.

But in equity the complainant does not necessarily rescind and sue; he may sue for rescission. He is required to restore the consideration, not, however, as a condition of acquiring the right to sue, but because of the equitable maxim that he who seeks equity must do equity. Mr. Pomeroy thus states the rule: "In administering these remedies, pecuniary as well as equitable, the fundamental theory upon which equity acts is

that of restoration,—of restoring to the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions they occupied before the fraud was committed,—assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases, the court applies the maxim, He who seeks equity must do equity, and will thus secure to the wrong-doer, in awarding its relief, whatever is justly and equitably due”: 2 Pomeroy’s Eq. Jur., sec. 910.

In *Neblett v. McFarland*, 92 U. S. 101, it is said: “The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed, as far as possible, in the situation in which they would have stood if there had never been any such transaction.”

Other writers upon equity jurisprudence deduce the right of the defendant to have restoration of his property from the maxim of equity that imposes doing equity upon the complainant as a condition upon which he secures relief: Adams’s Equity, 191; Story’s Eq. Jur., sec. 693.

Where the complainant has a plain and adequate remedy at law, and the condition of the parties has been so radically changed that it is difficult to put the defendant into as good position as before the sale, and the complainant has had substantially the benefits contracted for, the misrepresentation being as to a part only of the subject-matter, for which recovery of damages would be full relief, many cases may be found in which the court of equity has declined to interfere. But an examination of the cases discloses the fact that the most vigorous announcement of the rule requiring the restoration of the *status quo* is to be found in *dicta*, or in cases in which there has been ratification after discovery of the fraud.

In *Pintard v. Martin*, 1 Smedes & M. Ch. 126, and *Johnson v. Jones*, 13 Smedes & M. 580, relief was denied upon the ground that the complainants had ratified after knowledge of the fraud. What was said upon the other branch of the case seems to have been uncalled for, and to have been only incidentally remarked. The annotator of Adams’s Equity cites, in addition to these cases, the following other decisions: *Garland v. Bowling*, Hemp. 710; *Coppedge v. Threadgill*, 3 Sneed, 577; *Skinner v. White*, 17 Johns. 357; *Clay v. Turner*, 3 Bibb, 52. (It is curious to note how far they fall below supporting the proposition they are cited to sustain.)

In *Garland v. Bowling*, *supra*, the court held, first, that the evidence failed to support the allegation of fraud, and therefore the complainant could not recover; but it also appeared that the complainant did not seek to rescind the contract. What he attempted to do was to enjoin a judgment at law recovered for the price of the property sold (slaves), and to retain the slaves. *Coppedge v. Threadgill*, *supra*, was a case in which a sale of land was set aside; but the court had neglected to require the complainant, a married woman, to restore the cash she had received. The supreme court held that her coverture did not relieve her of the obligation to refund, and reversed the cause, that a decree might be entered to that effect. *Skinner v. White*, *supra*, was a case in which there had been a rescission by the act of both parties, and the only question was as to the extent of the liability of one of the parties to the contract. In *Clay v. Turner*, *supra*, the court refused either to specifically enforce a contract at the suit of one of the parties, or to rescind it at the suit of the other. On the subject of rescission, the court said that the matter complained of was not material under the terms of the contract; and besides, that the complainant had speculated upon the chances of getting a paying bargain through a series of years, and sought relief, not because of the want of capacity in the other party to convey, but because he found, after a long time, it would be better to rescind. A review of these cases illustrates how unreliable the work of the average annotator is often found to be.

Let us now refer to cases in which the specific question has been raised and passed on by courts of equity.

In *Barker v. Walters*, 8 Beav. 92, and *Jervis v. Berridge*, L. R. 8 Ch. 351, demurrers had been interposed to bills seeking rescission on the ground that no offer was made to restore the *status quo*. It was held that it was unnecessary to do so, since the court, on final hearing, would require the complainant to do equity. In the latter case, Lord Shelburne said: "Upon principle there appears to be no good reason why a plaintiff in equity, suing upon equitable grounds, should be required, on the face of his bill, to submit to those terms which the court at the hearing may think it right to impose as the price of any relief to which he may be entitled."

In *Savery v. King*, 5 H. L. Cas. 627, the party seeking rescission had disposed of the part of the property received by him (a policy of insurance), and on this branch of the

case Lord Cranworth said: "The one remaining question is as to the terms on which relief ought to be given. With respect to the mortgage, it is plain that Richard must, as far as possible, put Savery in the condition in which he must have been if no such mortgage had been made, and if his security had rested solely on the life of his father and the several policies of insurance. One of the eleven policies of insurance was sold by Richard in January, 1846. It is impossible, therefore, as to that policy, to restore Mr. Savery exactly to the position in which he stood in 1835; but he cannot be heard to complain of this, for, by the arrangement he had made or concurred in, he had led Richard to suppose that all the policies had become his own, and that he might deal with them as he thought fit; indeed, he himself suggested a sale of one or more of them as a step which it might be advisable for Richard to take. All, therefore, which can be done as to the policy which was sold is to charge Richard in account with Mr. Savery with the sum which it produced, together with interest from the time when it was sold."

In *Warner v. Daniels*, 1 Wood. & M. 90, the court directed in decreeing a rescission that the complainant should redeliver to the defendant the property received (certain shares in an incorporated company), but that if it should appear that he had disposed of any of the shares, then that he should restore the value thereof, with interest.

In *Myrick v. Jacks*, 33 Ark. 425, the court said: "It is no objection that complainant cannot put Jacks entirely *in statu quo* on rescission. The change in condition of the property was brought about by persuasion to accomplish a transaction in which Jacks was a party, and before the fraud was discovered, and by the action of complainant in a matter she did not understand. When courts cannot place parties wholly *in statu quo*, they are not thereby precluded from granting relief against fraud. They may proceed to do so as nearly as possible, and make compensation." See also *Gatling v. Newell*, 9 Ind. 574; *Crosland v. Hall*, 33 N. J. Eq. 111.

In *Ogden v. Thornton*, 30 N. J. Eq. 573, the court, finding itself unable to rescind the contract because the fraud occurred after the conveyance, remanded the cause, in order that the bill might be amended, so as to enforce a lien upon the property for the price at which it had been valued, the defendant by his fraud having prevented the complainant from receiving what he contracted she should have.

Upon principle and authority, we think it immaterial that the *status quo* cannot be literally restored. The defendant, by the grossest fraud, seduced complainant to exchange his farm for mere moonshine. What he professed to give was in fact of no value to himself or to any one else; he simply placed complainant in a position to be rendered insolvent; for by his purchase he secured nothing, except what should remain of the partnership assets after payment of debts, and the firm being hopelessly insolvent, this right was of no value. It may also be noted that from the very moment of the execution of the contract it was impossible for the defendant to be placed *in statu quo*, either by the act of complainant, or by both his act and the consent of the defendant. The defendant had been a member of a partnership, and his act in selling his interest therein was a dissolution of the firm; he could not again become a member without the assent of Mangum and Butler, over whom neither the defendant nor complainant had control. By his own act therefore a restoration of the *statu quo* was made impossible.

Nor do we think the record discloses ratification by inaction.

The complainant owed the defendant no duty to investigate the condition of the firm; he had the right to rely upon the truth of the representations made by the defendant, and all that was required was that he should act when he discovered the fraud of which he was the victim.

In *Rawlins v. Wickham*, 3 De Gex & J. 304, the complainant had been inveigled into an insolvent copartnership by false representations of its condition, and acted as a partner for five years, and then, having discovered the fraud, exhibited his bill for rescission and for an account, and his right to rescind was upheld. See also *Smith v. Smith*, 30 Vt. 139, which was an action at law successfully defended by the party defrauded, founded on facts strikingly similar to those involved here. It is held both at law and in equity that delay alone before the discovery of the fraud will not bar the right to rescind: Note to *Bryant v. Isburgh*, 74 Am. Dec. 655.

The dissolution of the new firm of Mangum, Butler, & Co., by the appointment of a receiver in a suit to which the defendant was not a party, does not, we think, preclude complainant of his right to rescind. It was not at his instance that the proceeding was instituted, and at last it is but the subjecting of defendant's property for the payment of his own debts.

The demurrer was properly overruled, and the decree is affirmed.

RESCISSION OF CONTRACT. — OFFER TO RETURN BENEFITS RECEIVED: *Bryant v. Isburgh*, 13 Gray, 607; 74 Am. Dec. 657-662, note; *Downer v. Smith*, 32 Vt. 1; 76 Am. Dec. 148; *Ware v. Houghton*, 41 Miss. 370; 93 Am. Dec. 258; *Woodbury v. Woodbury*, 47 N. H. 11; 90 Am. Dec. 555; *Francis v. New York etc. R. R. Co.*, 108 N. Y. 93; *State ex rel. Lewis v. Williams*, 39 Kan. 517; *Bell v. Keepens*, 39 Id. 105.

EFFECT OF DELAY IN SEEKING RESCISSION OF CONTRACT: *Wilbur v. Flood*, 16 Mich. 40; 93 Am. Dec. 203; *Goshen Township v. Shoemaker*, 12 Ohio St. 624; 80 Am. Dec. 386. Where plaintiff purchased furniture of defendant, and leased a boarding-house of him for five years, being induced to make the purchase and take the lease through false and fraudulent representations of defendant, and he offered in six months to rescind contract, having discovered the falsity of the representations, it was held that his offer to rescind was made within a reasonable time: *Hart v. Kimball*, 72 Cal. 283.

MILLS v. NEW ORLEANS SEED COMPANY.

[65 MISSISSIPPI, 391.]

INJUNCTION WILL ISSUE TO PREVENT VEXATIOUS LITIGATION AND A MULTIPLICITY OF SUITS, or to restrain a trespass continuous in its nature, as where repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive or inflict irreparable injury. Hence, where a company engaged in the business of buying and crushing cotton-seed was in the habit of sending out sacks to farmers to be filled and reshipped to it, and another company engaged in the same line of business willfully and persistently procured the sacks so distributed, and used them for their purposes, and, though repeated actions of replevin had been prosecuted against them, persisted in their purpose, it was adjudged that an injunction ought to issue to prevent a further repetition of these wrongs.

BILL for an injunction. The bill averred that the complainant was in the business of buying, collecting, and crushing cotton-seed, and was the owner of several hundred thousand sacks, all of which were legibly branded, and were necessary to be used in his business; that the course of business was to distribute these sacks along the railroads and public landings, where producers, finding them, would fill them and ship them to complainant; that the defendants were engaged in the same business, and were in the habit of taking complainant's sacks, and using them in their business, and for their purposes, and sometimes concealed the use of complainant's sacks by covering them by some of their own sacks; that complainant had brought numerous actions of

replevin to recover possession of his sacks, in which actions the defendants had given bonds; that the defendants persisted in their course, and during the preceding year had used many thousands of complainant's sacks, many of which had thereby been lost, damaged, or destroyed; and that the remedies available to complainant at law were entirely inadequate, etc. The prayer of the bill was for an accounting, for the delivery to complainant of all sacks of his in the possession or use of defendants, and for an injunction against any further use of such sacks by the defendants. Demurrer interposed by the defendants was overruled, and they appealed.

Lee and McKee, for the appellants.

Miller, Smith, and Hirsh, for the appellee.

ARNOLD, J. The demurrer was properly overruled. The allegations in the bill of repeated, willful, and continuous wrongs committed and threatened by appellants warranted the issuance of the injunction. The jurisdiction of equity in such case cannot be doubted.

It is said that the prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity; and it may be laid down as general rule that wherever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law except by numerous and expensive suits, equity may properly interpose and afford relief by injunction: 1 High on Injunctions, sec. 12; 1 Pomeroy's Eq. Jur., sec. 245.

Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. But if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive or inflict irreparable injury, and the legal remedy may therefore be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction: 1 Pomeroy's Eq. Jur., sec. 245; 3 Id., sec. 1357.

The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against the same wrong-doer in regard to the same subject-matter.

The ends of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding. And such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies. Affirmed and remanded, with leave to appellants to answer within thirty days after the mandate of this court herein is ailed in the court below.

WHEN INJUNCTION WILL LIE TO ENJOIN REPEATED ACTS OF TRESPASS: See *Port of Mobile v. Railroad Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note 352; *Smith v. Gardner*, 12 Or. 221; 53 Am. Rep. 342, and extended note 346-355. To prevent a multiplicity of actions at law, courts of equity will issue injunction where the trespass is a continuing one: *Wheelock v. Noonan*, 108 N. Y. 179; *Ellis v. Wren*, 83 Ky. 254.

HIGNITE v. HIGNITE.

[65 MISSISSIPPI, 447.]

CO-TENANCY — OUSTER. — EXCLUSIVE POSSESSION BY A TENANT IN COMMON WHO HAS TAKEN A CONVEYANCE, purporting to convey the property in severalty, does not constitute an ouster of his co-tenants, and therefore cannot bar their right to partition, although he claims to own the whole of the tract, unless knowledge of such claim is brought home to them.

BILL for partition. The land had been the property of John Hignite, and both before and after his death had been used as the family homestead. He left a widow and several children, but no will. Before her death, the widow, while in possession of the land, conveyed it to one of the children, the defendant in this suit, by a deed purporting to be in severalty, and which contained covenants of general warranty. Her only interest in the land at the time was her right of dower. Her grantee occupied the land for twelve years after the execution of this deed, and at one time offered to sell it, some two or three years after receiving the conveyance. One witness testified that the defendant always claimed the land as his own. The other heirs now sued for partition, and there was no evidence of any knowledge on their part of the defendant's adverse claim, unless such knowledge was to be imputed to them from his possession and cultivation of the land. The bill was dismissed. Complainants appealed.

Clifton and Eckford, for the appellants.

B. B. Boone and B. A. P. Selman, for the appellee.

COOPER, C. J. The complainants should have had a decree for partition. There is no sufficient evidence of an adverse holding by the co-tenant in possession to put in operation the statute of limitations as against the others. True it is that he bought the land, or took a deed therefor from the widow of the common ancestor, but there is no evidence that complainant had notice thereof or ever heard that he claimed to be the owner of the whole interest in the land. A tenant in common out of possession has a right to rely upon the possession of his co-tenant as one held according to the title and for the benefit of all interested until some action is taken by the other evidencing an intention to assert adverse and hostile claims. If one enters upon the land of a sole owner and without his consent, he must know that such possession exists, and within the time permitted by law take steps to vindicate his right. But the possession of a co-tenant is a lawful possession, and of and by itself is not evidence of an ouster.

The decree will be reversed and cause remanded.

POSSESSION OF ONE CO-TENANT WHEN THE POSSESSION OF ALL: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note 284; compare *Annelly v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725, and cases collected in note 735.

LINDZEY v. STATE.

[65 MISSISSIPPI, 542.]

EX POST FACTO LAW is one which in its operation makes that criminal or penal which was not so at the time the act was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.

EX POST FACTO LAW MAY MITIGATE THE PUNISHMENT of a crime after it is committed. This mitigation must consist of the remission of some separable part of the punishment before prescribed. If one penalty is substituted for another, the courts will not undertake to determine whether the latter is less severe than the former, but will refuse to apply any penalty whatever.

CHANGE IN A PENAL STATUTE HAVING BEEN MADE AFTER THE COMMISSION OF AN OFFENSE, and before a trial and conviction therefor, whereby the crime was so defined as to make criminal something which was before lawful, and a greater punishment prescribed, it was held that the offender could not be punished under either statute.

INDICTMENT and conviction for carrying a concealed weapon.

J. W. Downs and W. D. Brown, for appellant.

T. M. Miller, attorney-general, for the state.

ARNOLD, C. J. In December, 1887, appellant was indicted for carrying a concealed weapon. At that time the punishment prescribed by section 2985 of the code for such offense was by fine not exceeding one hundred dollars, and in the event the fine and costs were not paid, by hard labor not exceeding two months; and at that time the statute did not prohibit one who had good and sufficient reason to apprehend an attack from carrying concealed weapons.

In May, 1888, appellant was tried on the indictment, convicted, and sentenced to pay a fine of thirty dollars; but prior to that date, the legislature, by the act approved March 9, 1888, amended section 2985 of the code by striking out the words "having good and sufficient reason to apprehend an attack," and providing, without any saving clause as to past offenses, that the punishment for carrying concealed weapons shall be by fine not exceeding one hundred dollars nor less than twenty-five dollars, and in the event the fine and costs were not paid, by hard labor not exceeding two months nor less than one month. It is urged by appellant that he cannot be punished under the old law, because it has been repealed, nor under the amended law, because as to him it is an *ex post facto* law, both under the state and federal constitutions.

The purpose and effect of the amendment to section 2985 of the code was to repeal so much of the section as fixed the punishment for carrying concealed weapons, and permitted having good and sufficient reason to apprehend an attack to be a defense to the charge, and to prescribe a new and severer punishment for the offense. The punishment prescribed by the amendment was substituted for and took the place of that provided by the section before it was amended. The section as amended made it unlawful for one to carry concealed weapons, though he might have good and sufficient reason to apprehend an attack, and it increased both the minimum of fine and imprisonment provided by the section before its amendment, and prescribed the only penalty for the offense.

In this state of the law, how can appellant be lawfully punished for the offense with which he is charged? It is better that any criminal shall go unpunished than that any provision of the constitution shall be disregarded, or that the foundations of the criminal law shall be unsettled.

After the amendment to section 2985 of the code was adopted, appellant could not be punished under the section as it existed before the amendment, because so much of it as

related to the penalty had been repealed, and he could not be punished under the section as amended, because it operated prospectively from the date of the approval of the amendment, and there being no saving clause as to offenses committed before the passage of the amendment, it could not be applied to him: *Wheeler v. State*, 64 Miss. 462. As to him, the amended law was clearly an *ex post facto* law,—1. Because it abrogated the right which before existed of defending against the charge on the ground that he had good and sufficient reason to apprehend an attack, and made an act criminal which was not so at the time the amendment was passed; and 2. Because it changed but did not mitigate the punishment for the offense: Cooley's Const. Lim. 321-329; 1 Bishop's Crim. Law, sec. 281; 1 Kent's Com. 409; *Calder v. Bull*, 3 Dall. 386; *Hartung v. People*, 22 N. Y. 95; *Kring v. Missouri*, 107 U. S. 221; *Commonwealth v. McDonough*, 13 Allen, 581.

There is, perhaps, no provision of our state or federal constitution founded on broader or juster views of human rights and liberty than that which prohibits *ex post facto* laws. Mr. Madison considered the clause of the federal constitution on the subject as a "bulwark in favor of personal security and private rights": Federalist, No. 44. Mr. Hamilton ranked it as a security to liberty equal to the writ of *habeas corpus*: Federalist, No. 78. Blackstone defines it to be an *ex post facto* law "when after an act indifferent in itself is committed, the legislature for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it"; and he justly denounces such laws as more unreasonable than the methods of the Roman tyrant who wrote his laws in very small characters and hung them upon high pillars, the more effectually to deceive and ensnare the people: 1 Bla. Com. 46. In the interest of personal rights and liberty, this definition has been enlarged and liberalized by the general course of judicial decision in this country. In *Calder v. Bull*, 3 Dall. 386, *ex post facto* laws were classified by Mr. Justice Chase as follows: "1. Every law that makes an action done before the passage of the law, and which was innocent when done, criminal; 2. Every law that aggravates a crime, or makes it greater than it was when committed; 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time

of the commission of the offense, in order to convict the offender." This view of the character of *ex post facto* laws, with reference to our constitutional provisions against them, has been generally accepted and followed as correct: Cooley's Const. Lim. 323.

Afterwards, in *Fletcher v. Peck*, 6 Cranch, 138, Chief Justice Marshall defined an *ex post facto* law to be "one which renders an act punishable in a manner in which it was not punishable when it was committed," and this definition has been regarded as distinguished for its comprehensive brevity and precision: 1 Kent's Com. 409. And later, in *Kring v. Missouri*, 107 U. S. 221, the supreme court of the United States reasserts the opinion expressed by Mr. Justice Washington in *United States v. Hall*, 2 Wash. 366, that "an *ex post facto* law is one which in its operation makes that criminal or penal which was not so at the time the act was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *Garvey v. People*, 6 Col. 559; 45 Am. Rep. 531, and *State v. Willis*, 66 Mo. 131, are to the same effect.

Such being the nature of *ex post facto* laws, it is nevertheless true that the punishment for offenses already committed may be changed by statute, provided the punishment is mitigated, and not increased or aggravated, by the change. As the constitutional provision was enacted for protection against arbitrary and oppressive legislation, it is quite evident that it is not violated by any change in the law which goes in mitigation of the punishment. There has been much diversity of opinion as to what would constitute mitigation of punishment in such case, but the view best sustained by reason and authority is, that a law changing the punishment of offenses committed before its passage is objectionable as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object: Cooley's Const. Lim. 329. It is enough for courts to render judgment according to law, without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided.

"If the law," says Judge Cooley, "makes the fine less in amount or imprisonment shorter in point of duration, or relieves it of some oppressive incident, or if it dispenses with

some separable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion that the law was favorable to the accused, and therefore not *ex post facto*. But who shall say, when the nature of the punishment is altogether changed, that the punishment is diminished or increased by the change? What test of severity does the law or reason furnish in these cases? And must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment? or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case, the punishment prescribed by the new law is or is not more severe than that under the old law?" Cooley's Const. Lim. 324.

In *Hartung v. People*, 22 N. Y. 95, where a law was held inoperative as to offenses committed before its passage, Mr. Justice Denio said: "It is enough to bring the law within the condemnation of the constitution, that it changes the punishment after the commission of the offense by substituting for the prescribed penalty a different one. We have no means of saying whether the one or the other would be most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. . . . It is enough, in my opinion, that it changes the punishment in any manner except by dispensing with some divisible portion of it. . . . Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence would not be liable to objection. And any change which would be referable to prison discipline or administration as its primary object might also be made to take effect upon past as well as future offenses, such as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase the severity of the punishment of the convict, but it would not raise a question under the constitutional provision we are considering."

The doctrine of this case is commended by being just, simple, and readily understood, and it is well supported by authority: *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 Id. 124; *Kuckler v. People*, 5 Park. Cr. 212; *Carter v. Burt*, 12 Allen, 424; Cooley's Const. Lim. 329.

Clarke v. State, 23 Miss. 261, is not regarded as in conflict with this doctrine; for there, while the punishment for the

offense had been changed, there was a saving clause as to prior offenses, and the prisoner was sentenced under the law in force at the time the crime was committed.

The judgment is reversed, and the cause dismissed.

EX POST FACTO LAWS, to what they relate: *Railroad Co. v. Dickerson*, 17 B. Mon. 173; 66 Am. Dec. 148; *Grim v. Weissenberg School District*, 57 Pa. St. 433; 98 Am. Dec. 237.

EX POST FACTO LAW changing rules of evidence: *State v. Johnson*, 12 Minn. 476; 93 Am. Dec. 241, and note 251; and see *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182.

TIERNEY v. BROWN.

[65 MISSISSIPPI, 538.]

DEED — DESCRIPTION. — Description of land as part of "southeast quarter of section 5, township 14, range 4 east," is void for uncertainty, because there is nothing to show which "part" is intended.

DEED. — DESCRIPTION of land as "south part of section 5, township 14, range 4 east, 225 acres," is not void for uncertainty. The lands will be located by laying off 225 acres, having the south, east, and west sides of the section for boundaries, and the remaining boundary is parallel to the south line of the section, and sufficiently distant therefrom to include the requisite quantity.

SPECIAL MEETING OF A BOARD OF SUPERVISORS WILL BE PRESUMED TO HAVE BEEN LEGALLY CALLED.

EJECTMENT for "the south part of section 5, in township 14, range 4 east, containing 225 acres, more or less." Louisa C. Edwards defended for the southeast quarter of section 5. Among the deeds offered in evidence by the plaintiff was one in which two tracts were described, in the form indicated by the first and second points in the *syllabus*. Certain assessments were also offered in evidence, which are not here set out, because they involve the construction of a local statute. It also appeared that a meeting of the board of supervisors, the proceedings of which plaintiff offered in evidence, was not held at the time designated for the regular meetings of the board, but as to whether it was a special meeting regularly called there was no evidence. Judgment for the defendant as to the southeast quarter of section 5. Plaintiff appealed.

Wade R. Young, for the appellant.

Birchett and Gilland, for the appellee.

ARNOLD, C. J. The contest is over the southeast quarter of section 5, township 14, range 4 east. In one of appellant's muniments of title it is described as part of the southeast quarter of section 5, township 14, range 4 east. This description indicated no particular part of the subdivision named, and is therefore fatally defective and void: *Yandell v. Pugh*, 53 Miss. 295; *Bowens v. Andrews*, 52 Id. 596; *Cogburn v. Hunt*, 54 Id. 675; *Dingey v. Paxton*, 60 Id. 1038. But the land claimed by appellant is also described as south part of section 5, township 14, range 4 east, 225 acres. This description is not void for uncertainty. It is easy enough to lay off 225 acres of the south part of a given section. Such description is good to convey 225 acres, to be laid off in a strip of equal depth in the southern part of the section, the southern boundary of the whole section being the base line for the measurement: *Goodbar v. Dunn*, 61 Miss. 618; *Enochs v. Miller*, 60 Id. 19; *McCready v. Lansdale*, 58 Id. 879; *Bowers v. Chambers*, 53 Id. 259.

So that, treating part of the southeast quarter of section 5, township 14, range 4 east, as void for uncertainty, still a part of the land in controversy, at least, may be embraced in the other description,—the south part of section 5, township 14, range 4 east, 225 acres.

The list of land sold to the state is *prima facie* evidence that the assessment and sale of the land for taxes was valid, and there is nothing in the record that contravenes this evidence. The land having been assessed to the state in 1879, and afterwards omitted, under the act of 1880, from the list of lands belonging to the state, it was not necessary, as far as the record shows, that it should be reassessed, in order to sell it for the taxes of an unknown owner in 1881: *Grayson v. Richardson*, 65 Miss. 225. The assessment of 1879 was valid, except as to the name of the owner, and it does not appear that more was done towards omitting or striking the land from the tax roll as state land than to erase the name of the state as owner from the roll, and insert "unknown" in lieu thereof as to the ownership.

It is true that the meeting of the board of supervisors in October, 1879, at which they accepted and approved the land roll, was not at a time authorized by law for a regular meeting, but it is not shown that it was not a special meeting such as might have been legally called and held at that time, and meetings of boards of supervisors not affirmatively shown to

have been illegal are presumed to have been legal: *Corburn v. Crittenden*, 62 Miss. 125; *Brigins v. Chandler*, 60 Id. 862.

The judgment is reversed, and the cause remanded.

DESCRIPTION OF LANDS IN DEED, SUFFICIENCY OF: *Green v. Jordan*, 83 Ala. 220; 3 Am. St. Rep. 711; *Sherwood v. Whiting*, 54 Conn. 330; 1 Am. St. Rep. 116, and note 123.

PRESUMPTION IS THAT ACTS OF PUBLIC OFFICERS ARE IN ACCORDANCE WITH LAW, and such presumption can only be repelled by clear evidence of illegality: *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526, and cases collected in note 529.

PROCEEDINGS OF BOARD OF DE FACTO DIRECTORS ARE PRESUMED REGULAR until irregularity is shown: *State v. Kupferle*, 44 Mo. 154; 100 Am. Dec. 265; *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64, and note 69-70.

KING v. STATE.

[65 MISSISSIPPI, 576.]

CRIMINAL LAW — HOMICIDE. — EVIDENCE THAT DECEASED HABITUALLY WENT ARMED WITH DEADLY WEAPONS, and that this was known to his slayer, is admissible in behalf of the latter, on the same principle which justifies the admission of evidence of the threats or character of the deceased.

CRIMINAL LAW — HOMICIDE. — CHARACTER OF DECEASED cannot be shown by particular acts of misconduct not connected with the accused, as that he had engaged in frequent fights in which he used deadly weapons, and therewith made deadly assaults on his antagonists, and that these facts were known to the accused.

DECLARATIONS — RES GESTÆ. — STATEMENT MADE BY A SLAYER ABOUT A MINUTE AFTER shooting the deceased, of his reason for so doing, is not admissible in his favor.

INDICTMENT, conviction, and sentence for murder.

McCabe and Anderson, and *L. W. Magruder*, for the appellant.

T. M. Miller, attorney-general, for the state.

ARNOLD, C. J. There is testimony in the record that Cox, the deceased, made threats against the life of appellant a short time before the homicide, and that these threats had been communicated to appellant; that the deceased was a violent, vindictive, and dangerous man, and that these characteristics were known to appellant, and that while appellant and deceased were discussing the settlement of a controversy between them pending in a justice's court, deceased declared several times, in a loud and angry manner, he would pay nothing,

and then cursed appellant, and said, "I will kill you if you keep on bothering me, or if you say anything more to me about it, and raised up and run his hand into his pocket as if he was going to kill me sure enough," when appellant drew his pistol and fired.

In this state of case appellant offered testimony to show that deceased habitually went armed with concealed deadly weapons, and that appellant was cognizant of this fact, and that deceased was generally reputed, in the community in which he lived, to go so armed, and that this was known to appellant. The court refused to allow this testimony to go to the jury, and in doing so it erred.

Under the circumstances stated, it was for the jury to determine whether or not appellant had reasonable cause to apprehend danger to his life or limb at the time of killing; and to enable the jury to do this fairly and intelligently, by putting themselves as far as possible in the place of the appellant at the time of the killing, and viewing the situation as it appeared to him, the testimony should have been admitted. The same principle which justified the admission of evidence as to the character and threats of the deceased rendered the excluded testimony competent: *Payne v. Commonwealth*, 1 Met. (Ky.) 370; *State v. Smith*, 12 Rich. 430; *Moriarty v. State*, 62 Miss. 654; *State v. Graham*, 61 Iowa, 608.

Appellant also tendered witnesses to prove that the deceased had been engaged in frequent fights in which he used deadly weapons, and that the witnesses had seen him in several fights in which he made deadly assaults on his antagonists, and that appellant knew these facts. The court properly sustained objections to this testimony. The character of the deceased could not be shown by particular acts of misconduct on his part, in no way connected with the accused. That could be proved only by evidence of his general reputation: 1 Bishop's Criminal Procedure, sec. 1117; 2 Id., sec. 617; *Moriarty v. State*, 62 Miss. 654.

It was not error for the court to refuse to allow appellant to prove the declaration made by him after he was arrested, and but little more than a minute after the shooting, as to the reason why he shot the deceased. Such declaration was not a part of anything then being done, but a mere statement in regard to a past transaction, and was therefore incompetent: *Mayer v. State*, 64 Miss. 329; 60 Am. Rep. 58.

As a new trial must be awarded on account of the error

above indicated, it seems unnecessary to consider other errors assigned.

Reversed and remanded.

DECLARATIONS OR ACTS OF DEFENDANT IN HIS OWN FAVOR, unless part of the *res gestæ*, or of a confession, are not admissible for the defense: *Lynch v. State*, 24 Tex. App. 350; 5 Am. St. Rep. 888, and cases collected in note 893-894; *State v. Hicks*, 92 Mo. 431.

HOMICIDE. — ADMISSIBILITY IN EVIDENCE OF THREATS and statements made by deceased: *Campbell v. People*, 16 Ill. 17; 61 Am. Dec. 53-62, note. See *Webber v. Commonwealth*, 119 Pa. St. 223; 4 Am. St. Rep. 634.

EVIDENCE OF BAD CHARACTER OF DECEASED FOR TURBULENCE and violence is not admissible in favor of defendant in case of homicide, unless the conduct of deceased at the time of killing was such as to create in the mind of the accused a reasonable apprehension of great bodily harm: *Lang v. State*, 84 Ala. 1; 5 Am. St. Rep. 324, and note 328.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. O'BRIEN.

[111 NEW YORK, 1.]

CORPORATIONS. — THE PEOPLE OF THE STATE HAVE NO AUTHORITY, UPON THE DISSOLUTION OF A CORPORATION and the appointment of a receiver, to maintain a supplementary action against the receiver, the corporation, and others, for the purpose of obtaining a declaration of the rights and liabilities of the several parties, determining what were the assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation. Per Ruger, C. J.

CONSTITUTIONAL LAW — CORPORATIONS. — THE POWER TO REPEAL ACTS OF INCORPORATION, though reserved in such acts, must be exercised in subjection to the provisions of the federal constitution.

CORPORATION MAY ACQUIRE THE FEE IN PROPERTY, though created for a limited period only.

AN INTEREST IN THE STREETS OF THE CITY OF NEW YORK MAY BE GRANTED IN PERPETUITY, and irrevocably, by the city authorities.

GRANT OF FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY WILL BE CONSTRUED AS AN IRREVOCABLE GRANT IN PERPETUITY, though the corporation to which it is granted was created for a limited period only.

FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY is not a mere license or privilege enjoyable only during the life of the grantee, and revocable at the will of the state. It has been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

CORPORATIONS. — REPEAL OF A LAW AUTHORIZING CORPORATIONS does not destroy organization formed under it.

DISSOLUTION OF A CORPORATION DOES NOT TAKE AWAY OR DESTROY ITS PROPERTY OR ANNUL ITS CONTRACTS. Such dissolution has no other operation upon its contracts or property rights than the death of a natural person has on his.

RESERVATION OF RIGHT TO REPEAL THE CHARTER OF A CORPORATION enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business; but personal and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their general nature depend upon the powers conferred by the charter, are not destroyed by such repeal.

FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY SURVIVES THE DISSOLUTION of the corporation grantee, resulting from the repeal of its charter enacted pursuant to a right of repeal reserved by the legislature.

UPON THE REPEAL OF AN ACT OF INCORPORATION, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees.

CONSTITUTIONAL LAW. — STATUTE ATTEMPTING TO TAKE FROM THE BROADWAY SURFACE COMPANY, ITS STOCKHOLDERS and creditors, its franchise and property, and bestow them upon the municipality of New York, or to direct a sale of such franchise, and the payment of the purchase price to such city, is unconstitutional, and therefore void.

STATUTE MUST NOT BE GIVEN RETROACTIVE EFFECT unless its language expressly requires it.

CHARACTER OF A STATUTE IS NOT DETERMINED BY ITS TITLE, but by its provisions, unless its language is ambiguous, in which event its title and the occasion of its enactment may be considered to assist a correct understanding of its terms.

STATUTE PROVIDING PROCEEDINGS TO BE TAKEN ON THE DISSOLUTION OF A CORPORATION BY ACT OF THE LEGISLATURE MUST BE GIVEN A PROSPECTIVE OPERATION, and cannot be applied to a corporation so dissolved prior to the enactment of the statute.

CONSTITUTIONAL LAW. — WHEN, BY REASON OF THE DISSOLUTION OF A CORPORATION, ITS PROPERTY HAS VESTED IN ITS DIRECTORS, in trust for its stockholders and creditors, the legislature has no power to subsequently provide for the appointment of a receiver and the transfer of the corporate assets to him; such appointment to be made by a court in an action to which such directors are not parties, and in which the court has no other judicial discretion or authority than to designate such receiver.

STATUTE FORBIDDING A STREET-RAILWAY COMPANY from leasing its rights or franchises to any person or company operating a road parallel thereto does not inhibit traffic contracts with parallel roads for the partial use of their respective routes beyond the line of parallelism.

ACTION by the attorney-general in the name of the people against John O'Brien, receiver of the Broadway Surface Railroad Company, the mayor of the city of New York, the Broadway and Seventh Avenue Railroad Company, the Twenty-third Street Railway Company, Francis A. Palmer and William H. Hayes, trustees under certain mortgages. The president and trustees of the Broadway Surface Railroad Company, at the

time of its dissolution, were also parties defendant, as were several other persons:

Charles H. Tabor, attorney-general, and William A. Poste, for the people.

Denis O'Brien, for the receiver.

James C. Carter and Elihu Root, for the Broadway and Seventh Avenue Railroad Company.

Albert Stickney and Nelson S. Spencer, for Jacob Sharp and the Twenty-third Street Railway Company.

Edward W. Paige, for the mortgage trustees.

Thomas Allison, for the mayor of New York.

William C. Gulliver, for James A. Richmond and others.

RUGER, C. J. It will not be unprofitable, at the outset, to recall some of the prominent incidents attending the origin and operation of the Broadway Surface Railroad Company, for the purpose of obtaining a clearer view of the situation of the parties, and their relation to the subject of the action.

On May 13, 1884, that company filed articles of association, and became incorporated as a street-railroad company under the provisions of chapter 252 of the Laws of 1884, a general act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase.

The framers of the constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the high-

est price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the legislature alone, and authorized its acquisition by contract from such municipality: *In re Cable Co.*, 109 N. Y. 32; *Mayor etc. v. T. & L. R. R. Co.*, 49 Id. 657. The subsequent legislation of the state confirms this view, for at times it has provided that such right might be sold at auction, and by chapters 65 and 642 of the Laws of 1886 makes it obligatory upon the municipalities to dispose of such right by public auction to the highest bidder.

Previous to December 5, 1884, this company applied to the municipality of New York for authority to lay tracks and run cars over Broadway from the Battery to Fifteenth Street, and on that day, by resolution of the common counsel, the consent of the city was given upon the terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. It is conceded that the Broadway Surface company duly accepted the grant, and fully complied with and performed all of the terms and conditions provided therein, to entitle it to acquire, construct, and operate its road. We know, not only from contemporary history, but from cases which have already reached this court, that serious questions have arisen, with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities, but they are not involved in this case, and have no bearing upon the questions presented for discussion by the record. They were neither alleged in the complaint, supported by proof, or presented in the arguments of counsel. The company subsequently obtained the favorable report of a commission duly appointed by the supreme court in lieu of the consent of abutting property owners, and the order of the court confirming the action of the commissioners.

After its incorporation the Broadway Surface company mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market for sale to the public generally, and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street-railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface company, and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large

present pecuniary consideration from each of said companies, besides the exchange of mutual benefits and accommodations.

It is not disputed but that upon the entry of the order of confirmation the Broadway Surface Railroad Company became vested with the right of constructing a railroad on Broadway, and running cars thereon, to as full an extent as it had power to acquire, or the state and city authorities had authority to grant.

In the spring of 1885 the company caused its track to be constructed over the route authorized, and from that time to the fourth day of May, 1886, when it was dissolved by an act of the legislature, in connection with other railroad companies, ran its cars over such road and the connecting lines.

On May 14, 1886, in an action between the people, as plaintiff, and James A. Richmond, the former president of the Broadway Surface Railroad Company, as sole defendant, upon the application of the attorney-general, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface company, by a justice of the supreme court of the third judicial district, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of chapter 310 of the Laws of 1886.

The present action was a supplementary action brought July 8, 1886, by the attorney-general in the name of the people of the state against the city of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons, alleged to have had dealings with such company, either as stockholders, mortgagees, creditors, or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation, determining the fact as to what were assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation.

It is not claimed that the state has any legal interest in the determination of these questions, or that the receiver has not ample power at law to obtain possession of such assets as he may be entitled to, or to protect the property of the corporation from unlawful claims. It is claimed that the action is maintainable under the provisions of section 1 of chapter 310.

of the Laws of 1886, by virtue of the provision making it the duty of the attorney-general, upon the dissolution of a corporation by legislative action, "immediately thereafter to bring a suit to wind up and finally settle and adjust the affairs of such annulled and dissolved corporation."

The complaint shows that previous to the commencement of this action the attorney-general had brought a suit, in accordance with the statute, to wind up the affairs of the corporation; that a receiver had been appointed therein, and that such action was still pending undetermined. It then proceeds to allege that in consequence of various enumerated difficulties in obtaining possession of the property by the receiver, this action was brought "in aid of the former action to prevent a multiplicity of suits, and to carry out the provisions of chapter 310 of the Laws of 1886."

It is not easy to see on what theory such an action can be maintained. The state has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. Neither does the action seem necessary or proper in aid of the former action.

The mode by which the provisions of chapter 310 are to be carried out are specially provided by that act to be through the instrumentality of a receiver, and it is not claimed that the receiver lacked power to litigate and settle any of the questions presented by this complaint. The receiver might, perhaps, have brought an action similar in character to this, and would have had a legal interest, if any, in the property to be affected by it; but the state has no such interest, and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party: *People v. Booth*, 32 N. Y. 397; *People v. Ingersoll*, 58 Id. 13; 17 Am. Rep. 178; *Matter of N. Y. Elevated R. R.*, 70 N. Y. 339; *People v. B., F., & C. I. R. R. Co.*, 89 Id. 93; *People v. A. & S. R. R. Co.*, 57 Id. 161.

It is claimed that this court held in *People v. O'Brien*, 103 N. Y. 657, that the action was maintainable. We think that claim is unfounded. The question was not involved in the motion there considered. That was a motion to change the place of trial of the action. Whether the complaint stated a good cause of action or not, could not have been properly considered or decided on such a motion.

This action is certainly unusual, and is believed to be unprecedented in its scope and design; and if held to lie at

all, presents a strong and unfavorable contrast to the mode in which legal controversies are usually brought to the attention of judicial tribunals. Some members of the court, however, are of the opinion that the right of the people to maintain the action depends wholly upon the question of the constitutionality of chapter 310 referred to, and requiring the consideration of that question.

Considering, therefore, the magnitude of the interests affected, and the importance to the public generally of a speedy determination of the questions, involving the right of operating a street-railroad on Broadway, notwithstanding the dissolution of the corporation to which that right was originally granted, we refrain from disposing of the case upon the ground referred to, and proceed to an examination of the questions upon which such right depends.

Their determination involves an inquiry into the rights secured by the mortgagees and bond-holders through the mortgages upon the property and franchises of the railroad company; the validity of the traffic contracts made by it with other street-railroad corporations, and the effect which the legislation of 1886, comprised in chapters 268, 271, and 310, had upon such questions. In other words, we think the material question for discussion here is, whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and if so, upon whom the right of administering its affairs devolved.

Upon the trial of the action, a judgment was rendered in favor of the defendants, except the receiver, to the effect that the mortgages were valid liens upon the property and franchises of the company, and survived the dissolution of the corporation; that the traffic contracts were made by authority of law, and could be enforced notwithstanding the dissolution of the corporation; and that chapter 271, and parts of chapter 310, of the Laws of 1886, were unconstitutional, as violative of the restrictions of the fundamental law in relation to legislation impairing the obligation of contracts, and constituting a taking of "property without due process of law."

The court also held that this action was maintainable in the name of the people; that a receiver of the property of the dissolved corporation had been lawfully appointed; that he was entitled to take possession of its property, and wind up its affairs, and that the plaintiffs were entitled to a perpetual injunction restraining all of the defendants, except the receiver,

from proceeding with actions already begun, or from instituting other proceedings or actions to enforce, maintain, or assert any of the claims, demands, or rights of action affecting in any manner the affairs, property, rights, and privileges of the Broadway Surface Railroad Company which have been tried and determined in this action. Not only the plaintiff, but each of the defendants except the Broadway and Seventh Avenue Railroad Company, appealed from this judgment to the general term. That court affirmed the judgment of the trial court.

The plaintiff and all of the defendants, except the two railroad corporations, appeal from the judgment of affirmance to this court, and thus bring before us every determination involved in the judgment.

A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests affected, but because their determination will affect great public questions arising out of the limitations imposed by the constitution upon the legislative power, over the property of corporations lawfully acquired.

The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its franchises, to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is therefore urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street-railroads for the mutual use of their respective roads, fell with the repeal, and could not be enforced.

If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or

destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even of the framers of our constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the federal constitution.

Considering the power which the state has to terminate the life of corporations organized under its laws, and the authority which its attorney-general has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations, but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law.

It is not perhaps strange in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts, that *dicta*, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

Among other claims made by the state, it is contended that the stated term of one thousand years prescribed in its charter for the duration of the company constitutes a limitation upon the estate granted, and that therefore the corporation took a qualified estate only in its franchises, and that the rights reserved by the Revised Statutes (Laws of 1884 and 1850) and the constitution to alter, amend, and repeal the charters or laws under which corporations might be organized, also

constituted a limitation upon the estate granted, and that the exercise of the right of repeal by the state accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter.

It will be convenient, in the first instance, to consider the nature of the right acquired by the corporation under the grant of the common council with respect to its terms or duration. This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. New York and Erie R. R. Co.*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

The title to streets in New York is vested in the city in trust for the people of the state, but under the constitution and statutes it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street-railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable: *Yates v. Van de Bogert*, 56 N. Y. 526; *In re Cable Co.*, 109 Id. 32.

Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity for the purposes of a street-railroad: *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536; *Davis v. Mayor etc. of New York*, 14 N. Y. 506; 67 Am. Dec. 186; *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Mayor etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261; *Sixth Ave. R. R. Co. v. Kerr*, 72 Id. 330.

Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point.

In *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314, Judge Selden said, with reference to a grant from the common coun-

cil of New York in no material respect differing from this: "It amounted to an immediate grant of an interest, and, it would seem, of a freehold in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it. . . . The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution."

Judge Comstock, in *Davis v. Mayor of New York*, 14 N. Y. 506, 67 Am. Dec. 186, said: "As the consideration for constructing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and within a maximum limit they can charge what they please for the carriage of passengers. These rights are, in effect, granted in perpetuity."

In the case of *Mayor etc. v. Second Avenue R. R. Co.*, 32 N. Y. 272, it was said: "Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise which the common council could not take away or impair by any subsequent act of its own."

The resolution of the common council in this case expressly provided for traffic contracts by which the Broadway and Seventh Avenue Railroad Company should obtain a right to run cars over the tracks of the Broadway Surface railroad, and no conditions upon the right granted to the Broadway Surface Railroad Company, in respect to the duration of such contract rights or otherwise, were imposed by the terms of the grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation, or those who might lawfully succeed to its rights.

When we consider the mode required by the statutes and the constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it

cannot be supposed that either the legislature or the framers of the constitution intended to offer for public sale property the title to which was defeasible, at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done.

Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantee to mortgage, and otherwise dispose of, to the destruction of interests created therein by their consent.

We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the usual and common signification of that word: *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 Id. 263; 59 Am. Dec. 536.

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question but that, in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indescrutable by legislative authority, and as constituting property in the highest sense of the term.

It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally.

We will refer to a few only of the statutes on this subject from which the implication arises, not only that the state intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers, and

assigns to enjoy their use under an indefeasible title. Thus railroad corporations have been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited except by the agreement of the parties: Laws of 1839, c. 218; Laws of 1872, sec. 2, c. 1843; Laws of 1884, sec. 15, c. 252; to pledge them by way of mortgage as security for loans: Laws of 1850, subd. 10, sec. 28; to consolidate with other companies owning connecting and continuous lines of railroad, and continue the use of such franchises under the name of their successors: Laws of 1875, c. 108; *Shields v. Ohio*, 95 U. S. 319. Mortgagees and others have been authorized to purchase such franchises upon mortgage sale and otherwise, and afforded the right to organize so as to enjoy their use thereafter: Laws of 1857, sec. 1, c. 444; Laws of 1873, c. 469, 710; Laws of 1880, c. 113; Laws of 1874, c. 430. Purchasers upon a mortgage or execution sale have been authorized to form associations for the purpose of continuing the operation of such railroad with all its powers, privileges, and franchises: Laws of 1873, sec. 1, c. 469, 710; Laws of 1854, sec. 1, c. 282. The sale of such franchises has been authorized by the municipality where located to parties proposing to build street-railroads: Constitutional Amendment of 1875; Laws of 1884, sec. 7, c. 252; Laws of 1886, c. 62, 66. And by section 15 of the act under which this corporation was organized, such companies were expressly permitted to lease or transfer their rights and franchises to other street-railroad corporations. Indeed, it is matter of public history that one half of the railroads of the state are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution through transfers effected by the foreclosure of mortgages and otherwise.

The statutes cited, as well as others not specially referred to, indicate the general policy of the state to render such interests independent of the life of the original corporation and transferable as property by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider: *People v. Brooklyn, F., & C. I. R. R. Co.*, 89 N. Y. 84.

In *Mayor etc. v. Second Avenue R. R. Co.*, 32 N. Y. 261, Judge Brown said: "The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate from their duties as legislatures, having authority to pass ordinances for

the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property."

The same learned judge said in *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 364: "The grant to the city railroad company and its acceptance on the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the franchise of which it cannot be deprived without its consent or against its will."

It was held by this court in *Langdon v. Mayor etc.*, 93 N. Y. 129, that a grant from the city, of land to be used as a wharf, carried with it, as a necessary incident and appurtenance, a right of way for vessels over adjoining waters to the wharf, and that under such grants the property granted can only be resumed by the grantor when needed for public use by the exercise of the right of eminent domain.

The court also held in *People v. Brooklyn etc. R. R. Co.*, 89 N. Y. 75, that upon a foreclosure of the property and franchises of a railroad corporation, an individual could lawfully become their purchaser, and could hold and transfer them to any corporation having or acquiring the right to exercise such franchises.

In *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330, it was held that the right of a street-railroad company in the use of a street for the purpose of its business was a property right, subject to condemnation for public use. As we have already seen, the cases of *People v. Sturtevant*, *Mayor etc. v. Sixth Avenue R. R.*, *Davis v. Mayor etc.*, and *Milhau v. Sharp*, hereinbefore referred to, sustain the same views.

The case of *N. O., S. F., & Lake R. R. Co. v. Delamore*, 114 U. S. 501, is directly in point. There the franchise, as here, was acquired by the corporation from the municipal authorities of a city under general laws authorizing the formation of street-railroad corporations. It was held, "where there has been a judicial sale of railroad property under a mortgage, authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of

the railroad pass to the purchaser. . . . It follows that if the franchises of a railroad corporation, essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises, and they may be sold and pass to the purchaser at the bankruptcy sale."

In *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619, it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bond-holders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road."

These rights of property having been acquired and created under the express sanction and authority of the state, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the state to alter, amend, and repeal laws or charters.

The reservations applying to this case are claimed to be as follows: 1. Section 1, article 8, title "Corporations, how Created," Constitution of 1846, providing that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed"; 2. Section 8, title 3, chapter 18, of the Revised Statutes, seventh edition, providing that "the charter of every corporation that shall be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature"; 3. Section 48, chapter 140, Laws of 1850, providing that "the legislature may at any time annul or dissolve any incorporation formed under this act, but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders, or officers, for any liability which shall have been previously incurred"; and 4. Chapter 282, Laws of 1884, under which this corporation was organized, giving it all the powers and privileges granted, and subject to all of the liabilities imposed by chapter 140, Laws of 1850, and the several acts amendatory thereof, and further providing that "the legislature may at any time alter, amend, or repeal this act": Sec. 19.

The constitution of 1846 for the first time introduced restrictions upon the power of legislatures to grant special charters, and required that provisions for corporations, save in exceptional cases, should thereafter be made by general

laws. The obvious intent of the constitutional reservation was to remove any doubt as to the power of the legislature to amend or repeal the laws, whether general or special, authorized by that instrument for the formation of corporations, and seemed to leave the provisions of the Revised Statutes, in relation to reserved power over charters, in full force and effect.

It will be observed that the constitution and the act of 1884 provide specially for the amendment and repeal of statutes alone, but the Revised Statutes and the act of 1850 are addressed specially to the subject of the annulment and repeal of charters created under such statutes.

It seems to us that these provisions relate to different subjects, viz., the repeal of laws, and the annulment of charters formed under such laws, and that the power to do one does not naturally or properly include the power to do the other: *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

Certainly the repeal of a law authorizing corporations would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the legislature to create corporate bodies, the constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly that which they were precluded from doing directly. It must be assumed that the framers of the constitution, as well as the legislature, used the language employed by them intelligently, and according to its common and customary signification, and when they spoke of the annulment and repeal of acts and laws alone, did not intend to embrace charters as well. These two subjects have frequently been the occasion of legislative action, and since the restrictions upon the powers of the legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its literal sense, and especially so when both subjects were immediately within the contemplation of the law-makers.

In considering this question, the provisions of the Revised Statutes may be laid out of view, for if they contain any broader power than the act of 1850, they must be deemed to have been repealed by the provisions of the latter act, as inconsistent therewith. The reservations, therefore, which apply to this case are contained in the acts of 1850 and 1884, which constitute a part of the railroad charter.

These acts should be read and construed together, and, as thus considered, provide that the legislature may at any time alter, amend, and repeal these acts, and may also annul and dissolve charters formed thereunder, but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the state was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property, in the event of dissolution. By virtue of this contract, the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed upon.

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation, — whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business, and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation, we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges. The franchises last referred to being personal in character, and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise

made: *People v. B., F., & C. I. R. R. Co.*, 89 N. Y. 84; *People v. Metz*, 50 Id. 61.

In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise: *Gue v. Tide Water Canal Co.*, 24 How. 257; and by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our state authorizing the sale of the franchise and property of a railroad company on execution seems to recognize the indissolubility of the connection between the corporeal property, and its incorporeal right of enjoyment.

It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his: *Mumma v. Potomac Co.*, 8 Pet. 281, 285.

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred: *Butler v. Palmer*, 1 Hill, 335.

The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business: *People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige, 590; and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the federal constitution upon legislation impairing the obligation of contracts: *Munn v. Illinois*, 94 U. S. 113, 123.

We think no well-considered case has gone further than

this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 135: "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only could not be made the foundation of an authority to do that which is expressly inhibited by the constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power.

Since the decision of the celebrated *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518, the doctrine that a grant of corporate powers by the sovereign to an association of individuals for public use constitutes a contract, within the meaning of the federal constitution prohibiting state legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several states as the law of the land, and may be regarded as too firmly established to admit of question or dispute: *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536; *Milbau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 364. The intimation by Judge Story in that case that the rule might be otherwise if the legislature should reserve the power of amending or repealing it, led to the adoption by the legislatures of the various states of the practice of incorporating such reservations in acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the act of incorporation or in general statutes or provisions of the constitution. In either case they operate upon the contract according to the language of the reservation: Morawetz on Corporations, 464. It is manifest, therefore, that in the absence of such reserved power legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by

virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract with such effect upon the rights of the parties thereto as the law ascribes to it: *Sinking Fund Cases*, 99 U. S. 700, 748; *Tomlinson v. Jessup*, 15 Wall. 454, 457. In speaking of the exercise of this power by Congress in the *Sinking Fund Cases*, *supra*, Chief Justice Waite says: "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. . . . Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retaineth the power to establish by amendment. In doing so, it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted."

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: "The reserved power in question is simply that of legislation to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant

to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract, it is not sustainable."

This dissent proceeded upon the ground that the acts of Congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the constitution for the protection of life, liberty, and property. The majority of the court held, however, that such acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create.

If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void.

In *People v. National Trust Co.*, 82 N. Y. 287, the question was raised that a dissolved corporation was discharged from the obligation to pay rent accruing upon a lease subsequent to its dissolution. Judge Rapallo said: "This claim is not founded upon the allegation of any payment, release, or surrender, or anything affecting the merits of the claim, but upon the sole ground that by the dissolution of the corporation, the lease was terminated, and the covenant to pay rent ceased to be obligatory. We do not regard the dissolution as

having any such effect. Under the statutes of this state, on the dissolution of a corporation, its assets become a trust fund for the payment of its debts, and these include debts to maturity as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or canceled."

In *Commonwealth v. Essex Co.*, 13 Gray, 239, Justice Shaw said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted": *Albany R. R. Co. v. Brownell*, 24 N. Y. 345.

The case of *City of Detroit v. Detroit etc. Plankroad Co.*, 43 Mich 140, is not only in point, but entitled to high consideration on account of the distinction as a constitutional lawyer of the learned judge who wrote the opinion of the court. The question was, whether the legislature had power to compel the defendant to remove its toll-gates from within the city limits after they had been lawfully placed there under the provisions of its charter. Judge Cooley says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times, such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the state; it is enough that it has become private property, and it is thus protected by the 'law of the land.'"

And, finally, upon this branch of our subject, we are unable to see why section 48 of the Law of 1850 does not express the rule by which the question under discussion must be determined. That section is expressly made a part of the contract between the state and corporations organized thereunder, and specially provides for the effect which an exercise of the reserved power of repeal by the state shall have upon the franchises of the company. It shall not impair any remedy existing against the corporation, its directors or officers, upon a liability previously incurred. This was the contract under which the dissolved corporation issued its stock, mortgaged

its franchises, entered into traffic engagements, and contracted debts. Creditors, contractors, and stockholders had a right to rely upon the promise of the state, that the annulment of the corporate charter should not affect the remedies existing in their favor against the corporation; and this promise is a contract, protected by the provisions of the federal constitution.

In the absence of any constitutional provision prescribing the effect of such repeal, it was competent for the legislature to declare what that should be, and for the state to contract with reference to such a declaration. The right of repeal, as provided by the constitution, is fully recognized by the act of 1850, and the effect of the exercise of the power upon the rights of parties affected thereby is clearly defined.

We are therefore of opinion that the statute not only prescribes the rule, creates the contract, and regulates the rights of the parties upon the exercise by the state of the power of repeal, but it also correctly formulates the principle of law applicable to the situation. We think it necessary to refer only to some of the leading cases cited by the plaintiff's attorney in support of his argument, and are of the opinion that they are not controlling authorities upon the case under consideration. That of *Greenwood v. Freight Co.*, 105 U. S. 13, was an action by a stockholder in the Marginal Company against the Freight Company and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former after its dissolution by legislative action, and running cars thereon. The Marginal Company had refused to assert its rights, and the stockholder was therefore allowed to bring his suit to protect his interest in its property. Judge Miller says in that case: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the share-holders of such a corporation to their interests in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the

provisions requiring compensation to be made therefor under the power of eminent domain.

Neither has the case of *People v. Globe M. L. Ins. Co.*, 91 N. Y. 174, any bearing upon the questions involved in this discussion. It was held in that case that contracts for personal services contemplated the continued existence of the parties, and when either of them died it necessarily effected a termination of such contracts.

So, too, cases depending upon the effect of conditions in a grant to the creation of corporate life, or the acquisition of property rights thereunder, are, for obvious reasons, foreign to the questions involved here.

Here the grantee has performed every condition essential to its creation as a corporate being, and its capacity to acquire and hold property, and the only question is as to the effect of a power to extinguish the corporate life, reserved in its charter, upon its property rights.

In *Erie & N. E. R. R. Co. v. Casey*, 26 Pa. St. 287, 301, the question arose under a statute which specially provided that the state might resume all rights conferred in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of power, the legislature repealed the charter and resumed the subject of the grant. The corporation forfeited its rights by its voluntary act. The reservation in the charter was expressly made a condition subsequent. The case was between the representative of the state and the railroad corporation, and no rights of creditors, mortgagees, or stockholders were involved in its decision. It also appears by the case that the state and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question.

We are therefore of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street-railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation in the absence of any provision in the act of dissolution providing for such an event.

Sections 9 and 10, title 3, chapter 18, part 1, of the Revised Statutes, seventh edition, 132, 153, seem to furnish a conclu-

sive solution to the inquiry. They read as follows: "Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and other necessary expenses. Sec. 10. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, . . . and shall be jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands."

From these sections it would seem that upon the dissolution of this corporation, its remaining trustees became vested with the title of its property, and responsible to its creditors and stockholders for the value thereof. By operation of law a vested right of action accrued to all creditors and stockholders immediately on the dissolution against such trustees for the value of all property which did or might, by the exercise of reasonable diligence, come into their hands. This was a liability which after it once attached was beyond the constitutional power of the legislature to release or discharge: *Dash v. Vankleeck*, 7 Johns. 577; 5 Am. Dec. 291.

The evidence is undisputed that upon the dissolution, declared by the legislature, the trustees took possession of the railroad property, and surrendered its operation to the mortgagees of such railroad. This, in the absence of any objection on the part of creditors or stockholders, they had undoubted authority to do, and the possession of such mortgagees thereafter was the possession of such trustees. They undoubtedly became liable for the value of such property to creditors and stockholders by virtue of such possession, and their authority to administer the assets of the corporation for the purpose of discharging such liability became fixed by the law existing at the time the liability was incurred. The cases in this state fully support these propositions. As was said by the chancellor in *Kane v. Bloodgood*, 7 Johns. Ch. 90, 128, 11 Am. Dec. 417: "The reasonable construction of the act is, that the trus-

tees succeeded to all the rights and privileges of directors, and to the same means of defense."

In *McLaren v. Pennington*, 1 Paige, 102, it was held, as stated in the head-note, that "where an act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees."

In *Heath v. Barmore*, 50 N. Y. 305, Judge Rapallo said: "Under the provisions of 1 Revised Laws, 248, and 1 Revised Statutes, 600, sections 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed) for the purpose of paying the debts of the corporation, and dividing its property among its stockholders, and these provisions apply as well to the real estate as to the personal property of corporations. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor."

Allen, J., in *Central City Savings Bank v. Walker*, 66 N. Y. 428, speaking of the ownership of property and the property rights of a corporation, said: "During the life of the corporation, the body corporate was the legal owner, and upon the expiration of the charter, the legal title vested in the trustees in office, at the time, in trust for the creditors and stockholders."

There can be no valid distinction between property held in trust and that owned by individuals in respect to the protection afforded to it by the constitution. The reason for its protection is equally strong in either case, and the inviolability of the title is in both cases beyond the reach of legislative action: *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518.

It then remains for us to consider the validity of the provisions of chapters 271 and 310 of the Laws of 1886. We are fully impressed with the importance of this question, and the well-settled principles of construction which require every statute to be so construed as to uphold its constitutionality, if that may be done by a fair and reasonable interpretation of its language.

Another rule, equally well settled, precludes courts from inquiring into the motives of legislatures in making laws, and

to consider them simply with reference to their legal effect, upon the rights of persons subjected to their operation.

If, however, upon such examination it is found that constitutional rights will be invaded by the operation of the statute, it is the duty of courts to protect them by declaring the invalidity of the statute.

Upon such examination, we are of the opinion that chapter 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Broadway Surface company and its stockholders and creditors its property, and bestow the benefit thereof upon the municipality of New York. The act attempts to preserve the validity of the consents held by the corporation, notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase price to the city.

These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence or transferred, except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership without due process of law: *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717.

Such legislation has been frequently and emphatically condemned: *Taylor v. Porter*, 4 Hill, 147; 40 Am. Dec. 274; *Wynehamer v. People*, 13 N. Y. 434; *Westervelt v. Gregg*, 12 Id. 202; 62 Am. Dec. 160; *Kilbourn v. Thompson*, 103 U. S. 168.

In speaking of the reserved power to alter, amend, and repeal laws authorizing incorporations, in *People v. Boston and Albany R. R. Co.*, 70 N. Y. 570, Judge Earl says: "Under this reserved power, the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property, but it cannot be doubted that it may do all that is required by the act of 1874."

Judge Thompson said, in *Dash v. Van Vleeck*, 7 Johns. 477, 5 Am. Dec. 291: "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by

law the property of an individual without his consent, and give it to another."

The main argument presented to maintain the constitutionality of this act is the assertion that these consents do not constitute property within the usual signification of that term. We have considered that question, and do not agree with the claim. In view of the fact that the statute expressly contemplates their sale, transfer, and acquisition by a purchaser, it would seem unnecessary to go further to prove the fallacy of such a contention.

These remarks apply with equal force to chapter 310. The plaintiff has argued the case upon the assumption that the chapter referred to applies to the Broadway Surface Railroad Company, and should control the proceedings to wind up its affairs. That company was, however, dissolved on January 4th, and the act now under consideration was not passed until January 11th thereafter, and could not have retroactive effect unless its language expressly required it. We can see no ground for such a contention, unless we look beyond the language of the act and speculate as to the motives of the legislature in passing it. The act does not purport, in terms, to have a retroactive operation, and it is contrary to settled principles to give it such, unless there is something in the language of the act requiring this to be done.

Section 1 provides: "Whenever any corporation organized under the laws of this state shall be annulled and dissolved by an act of the legislature, it shall be the duty of the attorney-general to bring a suit to wind up the affairs of the corporation."

This language looks plainly to prospective cases arising under the act, and those only, and there is nothing in the body of the act to show that the legislature intended it to apply to a dissolution already accomplished.

The character of a statute is to be determined by its provisions, and not by its title: *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642; but when its language is ambiguous and doubtful, resort may be had to its title and the occasion of its enactment to explain an ambiguity in its terms. There is no ambiguity in the terms of this act, and nothing to indicate an intention to give it retroactive operation. The application of the act to the Broadway Surface Company can be sustained only upon the theory that such act applies to all corporations whatsoever, theretofore dissolved by legislative act, however

remote in point of time such dissolution may have been effected. Whether there are such cases or not, we are not informed, but we are invited to adopt a rule which would relate back and cover such cases if they exist.

We think such a decision would conflict with settled rules of construction. In *New York etc. R. R. Co. v. Van Horn*, 57 N. Y. 473, it was held that a legislative intent to violate the constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect when it is capable of any other construction; and that if all of its language can be satisfied by giving it prospective operation only, that construction will be given to it.

In the case of *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291, it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect; and in *Benton v. Wickwire*, 54 N. Y. 229, the court declared that neither original statutes nor amendments can have any retroactive effect, unless, in exceptional cases, the legislature so declare: *People v. Supervisors*, 43 Id. 130; *People v. McCall*, 94 Id. 587; *N. Y. & O. M. R. R. Co. v. Van Horn*, 57 Id. 473. The power of the legislature to give retroactive operation to a statute in some cases is conceded, but we believe that, to have such effect, it should declare its purpose in plain and unmistakable language, and that so unusual a signification should not be attributed to it by resorting to vague and equivocal inferences which have no support in the language employed. Such an interpretation would most emphatically be forbidden when it would interfere with vested rights. If we were at liberty to inquire into the circumstances under which this act was passed, and its connection with other legislation of the same period, we might conjecture that the legislature designed it to apply to the Broadway Surface Railroad Company; but it has not so expressed itself in the act, and the rules of construction to which we have referred forbid us from supplying the language necessary to give it such effect: *Benton v. Wickwire*, 54 N. Y. 226. But, assuming that the act was intended to apply and retroactive effect be given to it, we are of opinion that its material provisions are open to many serious objections which cannot be obviated or reconciled with the provisions of the fundamental law.

A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate, and

reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case, and it is immaterial whether he is a party in his own right or as trustee of an express trust; in either event he is a party to the action, interested therein and precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse judex in propria causa*. This law is objectionable also because it makes proof of the cost of the obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract. And, again, it requires the creditor to accept payment of an obligation before maturity. The time of payment of a pecuniary obligation is a material provision in such contract, and we know of no authority to require a creditor to accept payment in advance, any more than one to compel such payment by the debtor. Each party has the right to stand on the letter of his contract, and perform it according to its terms. But an objection to this act, even more serious than those considered, is found in the provision for the appointment of a receiver of the property of the dissolved corporation, and the transfer of its assets to him by force of the statute, after the title thereto had become vested in its directors.

It will not be claimed that the appointment of such a receiver by the court in an action against a stranger, without notice to the trustees, in the absence of the authority conferred by chapter 310, would confer upon him title to property previously vested in others: *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717. We cannot see how this case differs from the one supposed. The only authority the court had for making the appointment was derived wholly from the provisions of this act, and the court was not thereby invested with any judicial authority or discretion, except that of designating the holder of the title assumed to be transferred by the act. The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and perhaps, for cause, to remove fraudulent, dishonest, or incompetent trustees, and appoint others to perform the duties of the trust in order to avoid a failure thereof; but we know of no authority

for a court to appoint a receiver of property vested in trustees, without cause and without notice to them, or opportunity afforded to defend their title and possession. As was said by Judge Earl in *Stuart v. Palmer*, 74 N. Y. 184, 30 Am. Rep. 289: "Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing and an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." And the chancellor had previously said in *Verplanck v. M. Ins. Co.*, 2 Paige, 450: "Another fatal objection to the regularity of these proceedings is, that the appellants were deprived of the possession of their property without having an opportunity of being heard, and without any sufficient cause for such a summary proceeding. By the settled practice of the court in ordinary suits, a receiver cannot be appointed, *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights": *Devoe v. Ithaca etc. R. R. Co.*, 5 Paige, 521; *Ferguson v. Crawford*, 70 N. Y. 256; 26 Am. Rep. 589. As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the constitution in relation to the taking of property without due process of law. That the legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations, is indisputable, and if it had done so in the act of dissolution, or previously, it would undoubtedly have prevented the vesting of the property in trustees; but this it did not do, and it had no authority, by mere force of legislative enactment, to take vested property from one individual or trustee and give it to another: *McLaren v. Pennington*, 1 Paige, 102; *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518.

These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Company, as the provision for bringing an action by the attorney-general to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme that it cannot be supposed it would have been enacted except in connection with the

other provisions of the act. We therefore think this law is obnoxious to the objection that it assumes to take property without due process of law, and impairs the obligation of contracts. The questions as to the rights of the several parties under the traffic contracts are not before us in such form as to authorize us to pass definitely upon them; but we may properly, in this action, determine their validity so far as any objections are made to them by the plaintiff in this action. The plaintiff has not alleged any want of power on the part of the defendant corporations to run cars over the Broadway Surface railroad under their respective charters, and that question must be left until the attorney-general arraigns them in a direct action for usurpation: *People v. B., F., & C. I. R. R. Co.*, 89 N. Y. 93; *Denike v. New York & R. L. & C. Co.*, 80 Id. 599.

It is claimed that the contract with the Broadway and Seventh Avenue railroad is void because it is made with a company owning a parallel railroad. The trial court found that it was parallel to the Broadway Surface railroad. Assuming, for the purposes of this decision, that this was a question of fact and not of law, and that we are bound by the finding, we do not conceive that fact to be conclusive on the question. The material ground upon which the contention is based is the proviso to section 15, chapter 252, Laws of 1884, authorizing companies organized thereunder to lease or transfer their rights to run upon or over any portion of their railroad tracks to any other street surface railroad company authorized to run upon such route. The proviso is, that the section should not be construed to authorize any of such companies "to lease its rights or franchises" to any other company owning and operating a road parallel thereto.

By these contracts, the Broadway Surface railroad acquired the right from the Broadway and Seventh Avenue railroad, and from the Twenty-third Street Railroad Company, to run cars, and make a continuous trip for a single fare, to the termination of their respective roads, over the tracks of such roads; and such roads, from their respective points of connection, were thereby respectively authorized to run cars over the Broadway Surface railroad. That these rights were valuable and inured largely to the convenience and benefit of the traveling public, is not now denied.

The uniform course of legislation in reference to street-railroads shows a policy on the part of the state to facilitate

arrangements for the connection of continuous lines, and the transfer of passengers from one road to another, with the view of giving the longest service possible to the public without increase of fare. It can hardly be supposed that the legislature, while expressly making provisions for such facilities, intended to proscribe companies connecting with another road, which happened to own a line parallel for a certain portion of its length, but which also owned other lines extending beyond the parallel portion, from the benefits to be derived from a traffic contract. It seems to us that the obvious intent of this provision was to avoid the monopoly of parallel lines, and prevent the acquisition by one railroad company of the exclusive possession and control of such lines. It therefore prohibits leases to parallel roads. This does not, and in our judgment was not intended to, preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism. These contracts were not in terms or in effect leases of such rights, and did not surrender possession or control of the road by its original owner. Such contracts were also authorized by chapter 218 of the Laws of 1839, and we do not consider that statute to have been repealed by the proviso of the act of 1884, or other legislation on the subject.

There are many other interesting and important questions presented by the briefs of the able counsel for the respective parties which it might be proper to discuss, were it not that the demands made by the claims of practical litigation upon our time are so imperative as to forbid the consideration of abstract and speculative investigations. Such questions must be left to occasions when parties actually aggrieved present them in a litigation where their consideration is essential to the determination of rights. The views expressed lead to a denial of the relief sought in the action by the plaintiff.

The judgments of the special and general terms should be reversed, and the complaint dismissed, with costs to the defendant other than the receiver.

ANDREWS and EARL, JJ., concurred in the result, upon these grounds: 1. The annulling act is constitutional and valid, and its effect was only to take the life of the corporation; 2. All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts with other railway companies, survived; 3. The act, chapter 271, is unconstitutional;

4. That act, and the act, chapter 310, are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation, and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation; 5. As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance, and therefore the judgment should be reversed, and complaint dismissed.

Judgment accordingly.

EFFECT OF DISSOLUTION OF CORPORATION, WHETHER BY REPEAL OF ITS CHARTER OR OTHERWISE. — In the notes to *State Bank v. State*, 12 Am. Dec. 239, *May v. State Bank of North Carolina*, 40 Id. 737, and *Miners' Ditch Co. v. Zellerbach*, 99 Id. 336 et seq., the subject of the dissolution of corporations has been treated at some length. In those notes it is shown that at common law, upon the dissolution or civil death of a corporation, its real estate reverted to the original owners or their heirs, its personal property vested in the state or sovereign, and all debts due to or from it were by operation of law extinguished. And, what is more remarkable, that there have been courts in this country, even since the adoption of the constitution of the United States, which have upheld this doctrine. It is difficult to comprehend how any American court could conceive that such a doctrine was in harmony with the provisions of the federal constitution and the principles of American jurisprudence. In two of the states whose courts at an early day recognized this rule of the English common law as in force, subsequent decisions have expressly overruled the earlier decisions on this point. In *State Bank v. State*, 1 Blackf. 267, 12 Am. Dec. 234, the supreme court of Indiana decided that the effects of a dissolution of a corporation at common law were: 1. That its lands and tenements reverted to the person by whom they were granted to the corporation; 2. Its goods and chattels vested in the crown; 3. The debts due to and from it were extinguished. But in the case of *State v. Bailey*, 16 Ind. 46, 52, 79 Am. Dec. 405, 411, Perkins, J., in delivering the opinion of the court said: "It may be observed, further, that the supreme court of the United States in *Bacon v. Robertson*, 18 How. 480, has held that on the dissolution of a once legal corporation, its personal and real property become assets for the payment of its debts and distribution among the stockholders, contrary to the doctrine asserted in most elementary works; and in *State Bank v. State*, *supra*. This doctrine seems to us to be right." In the cases of *Commercial Bank of Natchez v. Chambers*, 8 Smedes & M. 9, and *Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168, the high court of errors and appeals held that this rule of the English common law, except as modified by statute, was in force in the state of Mississippi. But Campbell, J., delivering the opinion of the supreme court of that state in the case of *Bank of Mississippi v. Duncan*, 56 Miss. 173, said: "The injustice of the common-law rule, and its 'hostility to the more enlightened spirit of the age,' were urged upon the high court of errors and appeals by counsel, who insisted that it was condemned by reason and the principles of modern and enlightened jurisprudence; but the firm answer of the court was, that, except as modified by statute, the common-

law rule on this subject was in full force and operation in this state. We have no hesitation to declare our full concurrence with the views of counsel on this point, and our dissent from the view of the high court of errors and appeals announced in the case of *Coulter v. Robertson*, 24 Miss. 278." And the legislature of that state has enacted that, "on the final dissolution of any corporation, either by judgment or otherwise, all its real and personal estate shall be vested in the individuals who may have been members of the corporation, or stockholders, in their respective proportions, who shall hold the same as tenants in common; . . . and debts due to and from the corporation shall not be extinguished by its dissolution": Rev. Code Miss. 1880, sec. 1040. In the case of *Fox v. Horah*, 1 Ired. Eq. 358, 36 Am. Dec. 48, the supreme court of North Carolina held that the English common-law doctrine heretofore stated was in force in that state. And this decision has been approved in *Malloy v. Mallett*, 6 Jones Eq. 345. It would appear, however, that the injustice likely to result from the application of such a doctrine has been avoided by the interposition of the courts of equity in that state, for Smith, C. J., in delivering the opinion of the court in *Von Glahn v. De Rosset*, 81 N. C. 467, 473, referring to these cases, said: "These decisions were made and these conclusions reached after full discussion and careful consideration by as able jurists as ever presided in this court, and our reluctance to disturb them after so long an acquiescence by the profession could be overcome only by the clearest convictions of their error. They rest, however, upon strictly legal principles, well settled by authority, and carried to their logical results, the soundness of which, in their applications to the facts before the court, we are not disposed nor is it necessary to question or controvert. But a remedy has been suggested, and in numerous cases applied, which may seem to conflict with the decisions of this court, by calling into exercise on behalf of the creditors or others interested the equitable jurisdiction of the court, interposing and affording relief when none is admissible at law, and for the very reason that there is no legal remedy. While it is manifest that by its dissolution the corporation ceases to exist, and can sustain the relations of neither creditor nor debtor towards others, and hence debts to or from it become extinct at law, it is inequitable that creditors should go unpaid, when there are funds or debts of the defunct corporation which ought to be applied in payment, simply for want of some legal being intervening between the creditors and debtors of the corporation, with capacity to make the collection and adjustment. Accordingly, acting upon the maxim that trusts shall not fail for want of a trustee, and regarding the debts and other property of the dissolved corporation as the property of its creditors to the extent of their respective claims, the court of equity will stretch out its arms and gather up and collect the assets, though there be no strict legal owner to assert his right, and will appropriate and distribute them among the creditors, and subordinate thereto, among its secondary creditors, the stockholders themselves. The exercise of this equitable power, though not adverted to in the cases cited, is not denied, nor is it inconsistent with the principle therein declared. The remedy suggested grows out of those rigorous rules of the common law, and is the offspring of necessity to prevent a failure of justice."

These are the principal states in which the common-law doctrine on this subject has been recognized. There are to be found in the reports of other states statements of this doctrine of the English common law, but many of them are rather a display of the writer's common-law learning than a statement of the legal principles to be applied in the practical determination of

the questions involved in the cases. We doubt very much if any modern American case can be found in which, by the judgment of the court, the property, either real or personal, of a corporation has been taken from its creditors and stockholders and transferred to other persons or corporations, or appropriated to the use of the state, without provision made for compensation. The supreme court of the United States has never recognized the existence in this country of any such rule of law as that claimed to have been the rule of the English common law in reference to the property of a dissolved corporation. On the contrary, that tribunal has uniformly held that the property of such a corporation constitutes a trust fund for the payment of its creditors, and for distribution among its stockholders. Mr. Justice Miller, in delivering the opinion of the court in *Greenwood v. Freight Co.*, 105 U. S. 13, 19, said: "Personal and real property, acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the share-holders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." In the case of *Curran v. Arkansas*, 15 How. 304, 312, Mr. Justice Curtis, delivering the opinion of the court, said: "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied. . . . And, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the state, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts." Mr. Justice Story, in delivering the opinion of the court in *Terrett v. Taylor*, 9 Cranch, 43, 52, said: "But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." And the same distinguished jurist, in delivering the opinion in *Mumma v. Potomac Company*, 8 Pet. 281, 285, said: "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

The just and reasonable doctrines enunciated in the foregoing extracts are firmly established by the great weight of authority in this country: *Lum v. Robertson*, 6 Wall. 277; *Shields v. Ohio*, 95 U. S. 324; *Wood v. Dummer*, 3 Mason, 308; *Lothrop v. Stedman*, 13 Blatchf. 134; *Curry v. Woodward*, 53 Ala. 371; *Howe v. Robinson*, 20 Fla. 352; *Robinson v. Lane*, 19 Ga. 337; *Mining Co. v. Mining Co.*, 116 Ill. 170; *Powell v. Railroad Co.*, 42 Mo. 63; *McCoy v.*

Farmer, 65 Mo. 244; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Newfoundland etc. Co. v. Schack*, 40 Id. 222; *Towar v. Hale*, 46 Barb. 361; *Lea v. American etc. Canal Co.*, 3 Abb. Pr., N. S., 1; *Heath v. Barmore*, 50 N. Y. 302; *Hastings v. Drew*, 76 Id. 9; *Moore v. Schoppert*, 22 W. Va. 282; *Lumber Co. v. Ward*, 30 Id. 43. And it is now provided by statute in most if not all of the states, that, upon the dissolution of a corporation, its property of every kind shall be a fund for the payment of its debts, and that the balance remaining after meeting all its legal obligations shall be divided among its stockholders in proportion to their respective interests. And this would seem to be the only disposition of the property of a dissolved corporation that can be made in harmony with the principles of justice and in accordance with the provisions of the constitution of the United States. The property of a corporation belongs to its stockholders. In delivering the opinion of the court in *Moore v. Schoppert*, 22 W. Va. 291, Snyder, J., said: "In contemplation of law, the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be protected and enforced by the courts of equity." The effect of the dissolution of the corporation is to change the form, but not to destroy this ownership. As was said by Lowrie, C. J., delivering the opinion of the court in *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685: "The act of dissolution works a change in the form of the interests of its members, by destroying the stock, and substituting the thing which the stock represented, that is, a legal interest in the property, and leaves the members to such a division of this." This property no law can take from its owners and transfer to another without compensation, nor appropriate to the use of the state without due process of law. Said Shipman, J., in delivering the opinion of the court in *Lothrop v. Stedman*, 13 Blatchf. 143: "A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from or divided unfairly and unequally among the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights." And Mr. Justice Story, in delivering the opinion of the court in *Wilkinson v. Leland*, 2 Pet. 658, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced." Where lands are conveyed to a corporation by an absolute grant, it would seem that, in this country, there can remain in the grantor no reversion or possibility of a reverter: *Fletcher v. Peck*, 6 Cranch, 87; *Nicoll v. New York and Erie R. R. Co.*, 12 N. Y. 121; *Heath v. Barmore*, 50 Id. 302; *Yates v. Van de Bogert*, 56 Id. 526; *Erie etc. R. R. Co. v. Casey*, 56 Pa. St. 287. Chief Justice Marshall, in delivering the opinion of the court in *Fletcher v. Peck*, 6 Cranch, 137, said: "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right." And Black, J., delivering the opinion of the court in *Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 325, said: "The suggestion that the repealing act will have the effect of putting the road into the possession of the persons whose lands were taken to build it.

on is entitled to still less regard. In the first place it is founded in manifest error." And in *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 128, Parker, J., delivering the opinion of the court, said: "It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute." By the civil law also the property of a dissolved corporation belongs to its members, and must be divided among them: *Stark v. Burke*, 5 La. Ann. 740; *Citizens' Bank of Louisiana v. Levee S. C. P. Co.*, 7 Id. 286.

WHAT FRANCHISES, RIGHTS, AND CONTRACTS OF CORPORATION SURVIVE ITS DISSOLUTION. — A grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred, and that when they are abused or misemployed, they may be withdrawn by proceedings consistent with law: *Mumma v. Potomac Co.*, 8 Pet. 281; *Chicago L. I. Co. v. Needles*, 113 U. S. 574. Story, J., delivering the opinion of the court in *Mumma v. Potomac Co.*, *supra*, said: "A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them." And as the various states of the Union have, since the decision in the celebrated case of *Dartmouth College v. Woodward*, 4 Wheat. 518, either by statutes or in their constitutions, reserved the right to alter, amend, or repeal charters of corporations at the pleasure of the legislature, it becomes an important practical question to determine what franchises, rights, privileges, and contracts of the corporation survive its dissolution by the repeal of its charter or otherwise. The effect of the reservation of the right to alter, amend, or repeal a charter of incorporation is to prevent the charter from becoming what it otherwise would be, a contract with the state, to qualify the grant, and to prevent the exercise of the reserved power from falling within the prohibition of the federal constitution, as an act impairing the obligation of a contract: *West Wisconsin R'y Co. v. Supervisors of Trempealeau Co.*, 35 Wis. 257; affirmed 93 U. S. 595; *Mayor etc. of Worcester v. Norwich etc. R. R. Co.*, 109 Mass. 103; *State v. Commissioners of R. R. Taxation*, 37 N. J. L. 228; *Read v. Frankfort Bank*, 23 Me. 318; *McLaren v. Pennington*, 1 Paige, 102; *New York Cable R'y Co. v. Chambers Street etc. R. R. Co.*, 40 Hun, 29; *Suydam v. Moore*, 8 Barb. 358; *White v. Syracuse etc. R. R. Co.*, 14 Id. 559; *Tomlinson v. Jessup*, 15 Wall. 454; *Beer Co. v. Massachusetts*, 97 U. S. 25. Mr. Justice Field, in delivering the opinion of the court in *Tomlinson v. Jessup*, *supra*, said: "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." Property or rights which have become vested in a corporation under a legitimate exercise of the powers granted to it cannot be taken away from it by any legislative act: *Railroad Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 Id. 700; *Commonwealth v. Essex Co.*, 13 Gray, 239; *Detroit v. Detroit etc. Co.*, 43 Mich. 140; *Attorney-General v. Railroad Companies*, 35 Wis. 425. And when a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights: *Fletcher v. Peck*, 6 Cranch, 87; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358.

But there are franchises and privileges of a corporation which do not survive its dissolution. The franchise of becoming and being a corporation is

one of these. This is a franchise in its nature incapable of transfer or assignment: *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609; *Willamette Mfg. Co. v. Bank of British Columbia*, 119 Id. 191; *Hall v. Sullivan R. R. Co.*, 1 Brunner's C. C. 613; *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672. Curtis, J., in delivering the opinion of the court in *Hall v. Sullivan R. R. Co.*, 1 Brunner's C. C. 615, said: "The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected." Mr. Justice Miller, in delivering the opinion of the court in *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 197, said: "But there were franchises created by the act of incorporation which would be of no value to the purchaser, which, in the nature of things, could not be transferred to it, and which were not intended to be transferred to it. Obviously, among these was the right to exist as a corporation." And Mr. Justice Matthews, delivering the opinion of the court in *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 620, said: "If, as required by the argument of the plaintiff in error, we regard and treat the franchise of being a corporation as an incorporeal hereditament, and an estate capable of passing between parties by deed, or of being charged by way of mortgage, and of being sold under a power by virtue of judicial process, the logical consequences will be found to involve insuperable difficulties and contradictions. . . . A conception which leads to such incongruities must be essentially erroneous."

This franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation: *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; *Adams v. Boston etc. R. R. Co.*, 4 Nat. Bank. Reg. 99; *Sweatt v. Boston etc. R. R. Co.*, 5 Id. 234; *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609. A corporation may exist before it has acquired any other franchises, property, or privileges. And it may continue to exist as a corporation after it has lost or disposed of all its property: See note to *Miners' Ditch Co. v. Zellerbach*, 99 Am. Dec. 336, and cases cited. In the case of *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, the corporation acquired a franchise of taking tolls by grant from a local board, and not directly from the state, and it was held that its estate in that franchise ceased upon the expiration of the period for which it was granted, and to which it was expressly limited, and that the failure of the state to institute proceedings to dissolve the corporation could not keep this franchise alive, or restore it to life. Cooley, C. J., who delivered the opinion in that case said: "The grant may cease and the corporate existence remain untouched." So a mortgage executed by a corporation does not cover its corporate life or right to be a corporation. And when a corporation mortgages its property and franchises, and the same are sold under proceedings to foreclose the mortgage, or when the property and franchises of a corporation are sold at a bankrupt sale, the purchasers at such sales do not become the corporation, but are simply joint owners of the property. They do, however, acquire all the property, rights, and franchises of the corporation, except the franchise to be a corporation: *Memphis etc. R. R. Co. v. Railroad Commissioners*, 112 U. S. 609; *New Orleans etc. R. R. Co. v. Delamore*, 114 Id. 501; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Metz v. Buffalo etc. R. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201; *People v. Brooklyn etc. R'y Co.*, 89 N. Y. 75; *Atkinson v. Marietta etc. R. R. Co.*, 15 Ohio St. 21; *Wellsborough etc. Co. v. Griffin*, 57 Pa. St. 417. Mr. Justice Woods, in delivering the opinion of the court in *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 510, said: "When there

has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers."

In the case of *Wellsborough etc. Co. v. Griffin*, 57 Pa. St. 417, an act of the legislature had provided that a sale under a mortgage which a plank road company was authorized to make should pass to the purchasers at the foreclosure sale all the corporate rights, franchises, etc., as fully as if they had been the original corporators. It was held that the purchaser at the foreclosure sale did not become the corporation or acquire its name, and his duties could not be enforced by a suit against the company; even if he had done business as the company, he should have been sued in his own name. In some of the states it has been provided by statute that when the property and franchises of a corporation have been sold under foreclosure proceedings, the purchaser may form a corporation for the purpose of carrying on the business. A right to charge such rates of freight and tolls as the directors of the corporation should deem reasonable is not a right that survives the dissolution of the corporation: *Shields v. Ohio*, 95 U. S. 319.

The privilege of immunity from taxation granted to a corporation is not, it seems, one that will survive the dissolution of the corporation. Such immunity is not, properly speaking, a franchise of the corporation. It is in its nature personal and incapable of being transferred: *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. County of Hamblen*, 102 Id. 273; *State v. Maine Central R. R. Co.*, 66 Me. 488. Mr. Justice Field, in delivering the opinion of the court in *Morgan v. Louisiana*, 93 U. S. 223, said: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." Where, therefore, a new railroad company is formed out of two other companies which had by their charters a right of exemption from taxation, the new company will not be entitled to such exemption: *Railroad Co. v. Maine*, 96 U. S. 499; *Railroad Co. v. Georgia*, 98 Id. 359. But where the new corporation is by statute expressly invested with all the property, rights, and privileges of the old one, the exemption will accompany the property: *Tomlinson v. Branch*, 15 Wall. 460; *Humphrey v. Pegues*, 16 Id. 244.

It may perhaps be stated as a general rule, that in cases where there is a reservation of the right to alter, amend, or repeal the charter of a corporation, whatever rights, franchises, or powers in the corporation depend for their existence upon the granting clauses of the charter are lost by its repeal: *Greenwood v. Freight Co.*, 105 U. S. 13; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Co. v. Maine*, 96 U. S. 499; *Railroad Co. v. Georgia*, 98 Id. 359;

Sinking Fund Cases, 99 U. S. 700; *Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 287. In the case of *Greenwood v. Freight Co.*, *supra*, the legislature of Massachusetts, by an act passed in the year 1867, made certain persons, their associates and assigns, a corporation under the name of the Marginal Freight Railway Company, subject to the duties, restrictions, and liabilities imposed by the general laws relating to street-railway corporations, so far as they might be applicable, and granted to this corporation by its charter the right, in such manner as might be prescribed and directed by the board of aldermen of the city of Boston, to construct, maintain, and use a street-railway in certain enumerated streets of the city of Boston. In the year 1872, the legislature repealed this act by another act which incorporated the Union Freight Railroad Company, to which company it gave authority to run its track through the same streets and over the same ground covered by the track of the former company, and to take possession of that track upon payment of compensation. The complainant sought to enjoin the carrying out of the provisions of this latter act, and Mr. Justice Miller, in delivering the opinion of the court in the case, said: "It results from this view of the subject that whatever right remained in the Marginal company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter."

It is not easy in the present state of the law to determine with exactness what are the rights and powers that remain to the creditors and stockholders of a dissolved corporation after the repeal of its charter, made pursuant to a reserved right of repeal. Mr. Justice Miller, in the case last referred to, said on this subject: "We are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and creditors of such a corporation after the act of repeal." In the case of *Shields v. Ohio*, 95 U. S. 325, Mr. Justice Swayne said: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith; and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases." Chief Justice Waite, in the *Sinking Fund Cases*, 99 U. S. 718, said: "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." And Shaw, C. J., in delivering the opinion of the court in *Commonwealth v. Essex Co.*, 13 Gray, 253, said: "Does this come within the power of the legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business, and they purchased such lot from a third party, could the legislature prohibit the company from holding it? If so, in whom should it vest? or could the legislature direct it to revest in the grantor, or escheat to the public? or how otherwise? Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract

of meadow, and the owners claim gross damages, which are assessed and paid, can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases, — for extreme cases are allowable to test a legal principle, — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." In that case it was decided that a company which had accepted the provisions of a statute making it liable for all damages occasioned by its dam to fish rights above the dam, and paid large sums for such damages, could not afterwards be required by the legislature to make different fish-ways, notwithstanding the general law reserving to the legislature the right to alter, amend, or repeal charters of corporations.

From the foregoing extracts may be deduced the general principles by which to determine the rights and powers of a corporation which remain to its creditors and stockholders upon its dissolution. It is clear that all the real and personal property belonging to the corporation at the time of its dissolution remain to the creditors and stockholders, and that they cannot be taken away from them, or diverted to any other use or purpose: *Terrett v. Taylor*, 9 Cranch, 43; *Curran v. Arkansas*, 15 How. 304; *Greenwood v. Freight Co.*, 105 U. S. 13; *New Orleans etc. R. R. Co. v. Delamore*, 114 Id. 501; *Detroit v. Detroit etc. Co.*, 43 Mich. 140. So do its rights of contract and choses in action properly acquired by it during its lawful existence: *Mumma v. Potomac Co.*, 8 Pet. 281; *New Jersey v. Yard*, 95 U. S. 104; *Greenwood v. Freight Co.*, 105 Id. 13. A franchise to build, own, and operate a railroad is property of a corporation, and will remain to its creditors and stockholders after dissolution: *Hall v. Sullivan R. R. Co.*, 1 Brunner's C. C. 613. The right of a street-railway company to the use of the streets of a city for the purpose of its business, whether acquired by gift or purchase from the city authorities, is a property right which survives to the creditors and stockholders after the dissolution of the corporation: *New Orleans etc. R. R. Co. v. Delamore*, 114 U. S. 501; *Milhau v. Sharp*, 27 N. Y. 611; *Sixth Avenue R. R. Co. v. Kerr*, 72 Id. 330; *State v. Mayor etc. of New York*, 3 Duer, 119. Unpaid subscriptions to the capital stock of a corporation are corporate property, and may be reached by its creditors: *Hightower v. Thornton*, 8 Ga. 486. The right given by statute to a county to subscribe to the capital stock of a corporation is a right or privilege of the corporation which may be transferred to another corporation or to a consolidated corporation into which the former corporation has passed: *County of Scotland v. Thomas*, 94 U. S. 682; *Hannibal & St. Jo. R. R. Co. v. Marion Co.*, 36 Mo. 294; *Smith v. Clark Co.*, 54 Id. 58. In *Hastings v. Drew*, 50 How. Pr. 254, it was held that if the property of a dissolved corporation be divided among its stockholders, leaving debts unpaid, every stockholder receiving his share of the property is liable *pro rata* to contribute to the discharge of such debts out of the property in his hands, or its proceeds. And in *People v. National Trust Co.*, 82 N. Y. 283, it was decided that a lease to a corporation is not terminated by its dissolution, and that its covenant to pay rent does not thereupon cease to be obligatory; that its debts included those to mature as well as accrued indebtedness, and all engagements entered into by it which have not been fully satisfied or canceled.

EFFECT OF DISSOLUTION UPON SUITS PENDING BY OR AGAINST CORPORATION. — This subject is considered at length in the note to *May v. State Bank*, 40 Am. Dec. 737.

CORPORATION — MODES OF DISSOLVING: *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note 756; *Germantown Railway v. Fittler*, 60 Pa. St. 124; 100 Am. Dec. 546; effect of dissolution on property and rights of corporation: *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 746.

CORPORATION — CAPACITY TO TAKE TITLE IN FEE TO REAL PROPERTY: *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378; *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709; may acquire the title in fee, though the period of its existence is limited, when such power is given by its charter: *Rives v. Dudley*, 3 Jones Eq. 126; 67 Am. Dec. 231.

GRANT OF FRANCHISE BY MUNICIPAL CORPORATION, AS AGENT OF STATE, implies contract not to reassert the right to what was granted: *Port of Mobile v. Railroad Co.*, 84 Ala. 115; 5 Am. St. Rep. 342; *Stein v. Mobile*, 49 Ala. 362; 20 Am. Rep. 283; *Burlington v. Burlington etc. R'y Co.*, 49 Iowa, 144; 31 Am. Rep. 145. But it was held that an irrevocable grant by a city of the exclusive privilege to construct and operate a street-railway is unconstitutional: *Birmingham etc. R'y Co. v. Birmingham St. R'y Co.*, 79 Ala. 405; 58 Am. Rep. 615.

RIGHT TO CONSTRUCT AND MAINTAIN HORSE-RAILWAY IN PUBLIC STREETS OF CITY by authority of the legislature and the city council: See *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Milbau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; *Hinchman v. Paterson etc. R. R. Co.*, 17 N. J. Eq. 75; 86 Am. Dec. 252, and note 258.

CONSTRUCTION OF STATUTES. — RETROSPECTIVE CONSTRUCTION of a statute is never allowable, unless the intent that it shall so operate plainly appears upon its face, and this rule applies even to remedial statutes: *Richmond v. Henrico Co.*, 83 Va. 204.

BYAM v. COLLINS.

[111 NEW YORK, 143.]

FROM LIBELOUS PUBLICATION THE LAW IMPLIES MALICE and infers damages.

A LIBELOUS COMMUNICATION IS REGARDED AS PRIVILEGED, if made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.

WHETHER A LIBELOUS COMMUNICATION IS PRIVILEGED IS A MATTER OF LAW.

IF LIBELOUS COMMUNICATION IS PRIVILEGED, THE PLAINTIFF MUST ASSUME THE BURDEN of establishing, as a matter of fact, and to the satisfaction of the jury, that it was maliciously made.

LIBEL. — COMMUNICATION IS NOT PRIVILEGED BECAUSE MADE BY THE MALIGNER in the conviction that he owed a social duty to give currency to libelous rumors, that the victim of them may be avoided.

A LIBELOUS COMMUNICATION IS NOT PRIVILEGED when made to an unmarried woman concerning her suitor, by the fact that she, some years before, had requested to be informed of anything the defendant knew

"about any young man she went with, or, in fact, any young man in the place," if the defendant was not a relative of such young woman, and owed no special duty to her.

LIBEL. — ONE WHO MAKES A LIBELOUS COMMUNICATION TO AN UNMARRIED WOMAN concerning her suitor, to break up relations which it was believed might result in their marriage, though prompted by friendship and the solicitations of mutual friends, acts at his peril, and is answerable in damages to the person maligned, if the communication, though believed to be true, is shown to have been unfounded in fact. In such a case, the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

**MALICE IS PRESUMED FROM ORAL AS WELL AS FROM WRITTEN DEFA-
MATION.**

SLANDEROUS COMMUNICATION IS NOT PRIVILEGED merely because uttered in the strictest confidence by one friend to another upon the most urgent solicitation.

ACTION against Mrs. Jennie E. Collins for slander and libel. Her husband was joined as a defendant. The alleged libel consisted of the following letter, written by Mrs. Collins to Dora McNaughton: —

"MY DEAR DORA, —

"For a long time I have been earnestly solicited by your friends and mine to warn you in some way of the danger you are in in the company you keep at present. I have refrained from doing so for various reasons, the principal one being the fact that I was very rudely treated by you one day at Mrs. Grant's, when I was there for the purpose of doing you a favor, which you have never acknowledged to this day, although you have availed yourself of my friend's kindness.

"You have also given up coming to my house, for what reason I do not know, for I have never injured you or yours in thought, word, or deed.

"But to return to the subject. Since the exhibition of last Wednesday, I have decided to hold my peace no longer, feeling that if I do, and your life is wrecked (as it is sure to be if you marry or have further acquaintance with that man), that I shall in some way be responsible for it, inasmuch as I neglect to do my duty. And oh, Dora! be warned by me before it is too late; have nothing to do with him for the sake of the friendship we once had, and which was very dear to me. Oh, Dora! I have loved you as a sister, and I cannot see you degraded, and your name becoming a by-word in the mouth of every rowdy in town. Can you thus lightly set aside a tried and true friend of years for the sake of an adventurer of a few weeks' acquaintance? I have thought that ere this your usual

good sense would come to your rescue; but the mystery seems to grow deeper and deeper.

"There are persons in this town who, at present, profess great friendship for you, who, I feel certain, are leading you on only that they may glory over your humiliation, which must come sooner or later, for you cannot handle fire and not be burned, and it is to save you from that I make this appeal to you. I have every reason for believing that both my husband and myself have been lied about and misrepresented to you; but have you been honest in listening to a stranger, and taking his word, and believing it without further proof?

"Is it possible that you know the character of that man? I know that if you did you would spurn him from your house and presence forever; and if you will but give me the opportunity of a personal interview with yourself, I will tell you a few truths, and as no one need fear the truth, that will open your eyes, and, perhaps, save you from a life-long sorrow and regret.

"Do not deny me this favor, for you are still very dear to me, and I feel that I must interfere in your behalf, as no one else has dared to do it. I close with my love to you, hoping that our heavenly Father may keep you from all harm, and show you the right way out of these difficulties.

"I remain, as ever, your true friend,

"JENNIE E. COLLINS."

The slander consisted of the utterance of defamatory words concerning plaintiff to Dugald Cameron, the substance of which words was that plaintiff was a bad man, not fit to associate with decent people; that he had insulted a young lady by going into her room, and she had, with a revolver, compelled him to "get down on his knees and beg of her to let him off"; that he had gone to Canada with a woman in private; that he was guilty of dishonest practices as a lawyer, and was not to be trusted, and was altogether void of principle. The writing of the letter was admitted; but defendant alleged that it was not written nor sent with malice or ill feeling; that it was founded on information then believed to be true, and was privileged, owing to the intimate relations between the writer and Miss McNaughton. The slander was alleged to have been uttered under the following circumstances: Dugald Cameron, a few days after the writing of the libelous letter by Mrs. Collins, called on her, for the professed purpose of amicably settling the difficulty between her and plaintiff, de-

clared himself to be a friend of Mrs. Collins, and solicited her to talk to him as a friend. She then told him what she had heard of plaintiff, and that all she knew of him was hearsay; that the whole conversation with Cameron was on his assurance of his friendship for Mrs. Collins, and that what she said to him should not be used to her disadvantage. Judgment for defendants, which was affirmed, and a new trial denied by the general term.

A. J. Abbott, for the appellant.

James Wood, for the respondents.

EARL, J. The general rule is, that in the case of a libelous publication the law implies malice, and infers some damage. What are called privileged communications are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 El. & B. 344, and has been generally approved by judges and text-writers since. In *Toogood v. Spyring*, 1 Crompt. M. & R. 181, an earlier case, it was said that the law considered a libelous "publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned"; and that statement of the rule was approved by Folger, J., in *Klench v. Colby*, 46 N. Y. 427, and in *Hamilton v. Eno*, 81 Id. 116. In *White v. Nicholls*, 3 How. 266, 291, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when

upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury.

It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties, the one making and the one receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley v. Adams*, 15 Com. B., N. S., 392, Erle, C. J., said: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification"; and in the same case, Byles, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty, not as a volunteer in a matter in which he has no legal duty or personal interest, to defame another, unless he can find a justification in some pressing emergency. In *Coxhead v. Richards*, 2 Man. G. & S. 569, 602, Coltman, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted hon-

estly, and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others; the propensity to tale-bearing and slander is so strong amongst mankind, and, when suspicions are aroused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected"; and in the same case, Cresswell, J., said: "If the property of the ship-owner, on the one hand, was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not know to be true was quite as strong as the duty to communicate to the ship-owner that which he believed to be true."

One may not go about in the community, and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency, that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson v. Home*, 1 Brod. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In *Storey v. Chalklands*, 8 Car. & P. 234, one Hersford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all: "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," etc.,—and Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement without waiting to be asked. In *York v. Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to prepare a Christmas festival for the Sunday school. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and

being asked where he got it, said he did not know, but that "he had been with the plaintiff," who was a woman, and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet Devens, J., in the opinion, said: "The ruling requested by the defendant, that the communication made by him to Mrs. Newton was a privileged one, and not actionable, except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York, but he was under no obligation to give any reason therefor, however persistently called upon to do so; and even if Mrs. Newton had an interest in knowing the character of Mrs. York, as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer, and had been engaged in the practice of his profession at Caledonia for several months and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora, and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora, and they had been very intimate friends. Dora had a father and no brother, and Mrs. Collins had a brother. During the time of this intimacy, and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went with, or, in fact, any young man in the place, to tell her, because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him"; that she, Mrs. Collins, had a brother, and

would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged, and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors and believed them, and therefore did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had any interest; but it was for information about the young men generally with whom she associated. Nor, literally construing the language, did Dora wish for information as to the gossip and rumors afloat about young men. What she asked for was such facts as Mrs. Collins knew, and not for her opinion about young men or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her, and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information did not make the defamatory communication privileged: *York v. Johnson, supra.*

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so, if they did so find. On the contrary, it is clear that

Dora would not, at the time, have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins, the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins's letter was prompted by her friendship for Dora, and by the solicitation of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself, as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her," upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins in writing that letter act fairly, act judiciously,—not in the matter of good taste, but did she, with the facts which had been brought to her mind, act in a conscientious and proper manner? If she did, if she acted as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text-books and judicial opinions supporting the contention of the defendant that this letter was, in some sense, a privileged communication. But after a very careful research, I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than that of any other, is that of *Todd v. Hawkins*, 8 Car. & P. 88. In that case, a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character, and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury was satisfied that, in writing it, he acted *bona fide*, although the imputations contained in the letter were false, or based upon the most erroneous information; and if he used expressions, however harsh, hasty, or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other, there would have been a mere question of damage.

A case nearer in point is that of "*The Count Joannes*" v. *Bennett*, 5 Allen, 169; 81 Am. Dec. 738. There it was held that a letter to a woman containing libelous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that in writing the letter the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not in any way interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before the same learned court decided the case of *Krebs v. Oliver*, 12 Gray, 239, wherein it was held that statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one

who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words without knowing or ascertaining their truth far outweighs any claim of mere friendship."

I am, therefore, of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was also error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies in part to these slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged, the law implies malice.

The judge further charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified in substance that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications.

There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins, as an emissary from or agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous

communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her, either to gratify his curiosity, or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action, but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, the judgment should be reversed, and a new trial granted.

DANFORTH, J., dissented. After restating the facts of the case, he said: "The letter is one of warning or entreaty. It names no one as its subject, but it was conceded that the person referred to was the plaintiff, and he is held up in numerous phases conveying divers degrees of disparagement and imputation to reproach, and as a person to be feared and avoided: *Craft v. Boite*, 1 Saund. 248, and note. The trial judge, therefore, ruled that it was libelous, and the appellant is entitled to have that ruling stand as the law of the case. The publication was admitted. From these circumstances, the law supplied the rest, and the burden of justification or excuse was cast upon the defendant: *Lewis v. Few*, 5 Johns. 35. The question, therefore, is, whether the occasion of the publication, or the circumstances prompting it, furnish a legal excuse for that act, and so repel the inference of malice arising from the matter of it, as to bring it within the exception to which I have referred. If it does, then in legal contemplation the communication is privileged. Of such communications there are two classes: In one the privilege is absolute, and a shield against any action for defamation, as where the charge, even if false and malicious, is made in the course of official duty or under certain other circumstances not embracing those before us; in the other class the privilege is qualified, and may be overcome by proof of malice. This class includes cases where the interest and welfare of society and common convenience require that the defendant should be permitted to speak freely in the relation in which he is placed, provided he confines himself within the bounds of what he believes to be the truth: *Hastings v. Lusk*, 22 Wend. 410; 34 Am. Dec. 330.

"The law frequently referred to upon this subject is to be found in *Too-good v. Spyring*, 1 Crompt. M. & R. 181-192, and requires that the communication, to be privileged, should be fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs where his interest is concerned. In *Harrison v. Bush*, 32 Eng. L. & Eq. 173, substantially the same rule is restated, but it is added 'that duty cannot be confined to legal duties which may be enforced by indictment, action, or *mandamus*, but must include moral and social duties of imperfect obligation,' and as thus amplified, the rule is adopted in this court, and may be considered as well settled: *Ormsby v. Douglass*, 37 N. Y. 477; *Hamilton v. Eno*, 81 Id. 116. A common application of the rule is to words

spoken by a former master in giving a character of a servant: *Weatherston v. Hawkins*, 1 Term Rep. 110; or in answering an inquiry concerning the solvency of a tradesman or banker, or between persons having a common interest in the subject to which they relate. It applies, however, to other cases of the same nature, and is meant to protect the communications of business and the necessary confidence of man in man, as where one employed by a sheriff to ascertain and inform him of the facts relating to an interference with a levy upon certain cattle, wrote a letter charging the plaintiff with feloniously taking them: *Washburn v. Cooke*, 3 Denio, 110; or where, at the request of the father, a person made inquiry as to the character of his daughter's husband: *Atwill v. Mackintosh*, 120 Mass. 177. In each instance the report, if made in good faith, and reasonably believed true, was held to be privileged: *Id.* So it is said to extend to the confidential communications of friendship: *Hoit on Libel*, 235; and will undoubtedly include every case where, in the discharge of any legal, natural, or social obligation, the defendant states what he honestly believes the plaintiff's character to be, whatever the charges may be which he thus imputes to him. Thus in *McDougall v. Claridge*, 1 Camp. 267, it was held that a letter written confidentially concerning a solicitor, and under an impression that its statements were well founded, could not be the subject of an action; and in *Heer v. Donson*, mentioned in Buller's *Nisi Prius*, page 8, where the defendant said, 'in confidence and friendship, by way of warning,' to one about dealing with the plaintiff, words affecting his credit, no action would lie because the manner of speaking repelled the idea of malice. In *White v. Nicholls*, 3 How. 286, Justice Daniel enumerates among such communications 'words spoken in confidence and friendship as a caution'; and applying the same principle to specific cases, it is laid down in a recent work on this subject (*Odgers on Libel and Slander*, 210) that a father, guardian, or intimate friend may warn a young man against associating with a particular individual, or may warn a lady not to marry a particular suitor, though under the same circumstances a stranger could not do so without incurring liability.

"Among other instances of privilege, and of the same nature, is any communication required by the interest of the person to whom it is made, and reasonably called for or warranted by the relation in which the person making it stands to him, as a letter written in good faith by a person to his mother-in-law, warning her of the bad character of the man she was about to marry: *Todd v. Hawkins*, 8 Car. & P. 88-91. The same principle was applied in *Adcock v. Marsh*, 8 Ired. 361. It there appeared that Anderson Adcock was twice married. His first wife died, leaving a daughter Sally, and one other. Upon his second marriage, the defendant, Mrs. Marsh, advised the daughters of the first Mrs. Adcock that they ought not to live at their father's, giving reasons in words relating to the plaintiff, his then wife, which were in themselves *prima facie* actionable. In excuse, it was shown that the first Mrs. Adcock 'had requested the defendant Marsh, with whom she was very intimate, to give "advice" to her daughters,' but the trial judge ruled that this was insufficient, in any view, to rebut the implication of malice, and after verdict for the plaintiff, a new trial was granted, the court of review holding that the communication was privileged, if made by the defendant in good faith, and as to that, the jury were the proper judges. The learned judge, speaking for the court, and referring to the ruling of the trial judge, said: 'The idea seems to have been that the communication was not a privileged one, because the defendant had no interest in the matter, and stood in no relationship to the witness,' the person ad-

vised by defendant, 'but was, in every respect, a volunteer'; and after citing and commenting on various cases, says, in substance, that whether there was just cause for the opinion expressed by Mrs. Marsh or not, she was justified in making it known to the daughter, if she honestly held that opinion, 'and that her communication so made was a privileged one. . . . And we further hold,' he says, 'that without any request from the mother, she would, under the other circumstances, have been justified.'

"To the same effect are the cases in our own court. In *Lewis v. Chapman*, 16 N. Y. 369, Selden, J., enunciates the rule as embracing both alternatives, and says: 'There is no doubt that when the communication is made *bona fide* in answer to inquiries from one having an interest in the information sought, or when the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as privileged'; and referring to the authorities, says these cases show that all that is necessary to entitle such communications to be so regarded is 'that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others'; and although the information given in that case was volunteered, and not in answer to any inquiry, the judges all agreed that the relations existing between the person addressed and the defendant rendered the communication privileged. In the later case of *Sunderlin v. Bradstreet*, 46 N. Y. 128, 7 Am. Rep. 322, it appeared that the defendants, of their own volition and for their own profit, collected information concerning the condition of traders, and this they communicated to subscribers not interested in the matter, and the court, reiterating the rule laid down in *Lewis v. Chapman*, *supra*, held that, owing to that want of interest in the person addressed, the communication was not privileged. Protection would seem to be due, therefore, to communications between persons having relationship, whether by blood or marriage, or as principal and agent, attorney and client, or as intimate friends, or as the result of any trust or confidence, provided such communications are fairly warranted by a reasonable occasion, and honestly made.

"It follows that the term 'malice,' in a legal sense, has no application where there is a just cause or occasion for speaking the words complained of, although under other circumstances they would constitute a slanderous charge: *Jones v. Givin*, Gilbert's Cas. 185; *Washburn v. Cooke*, and other cases *supra*. In discussing this question, the learned judge, already quoted, says: 'When the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence': *Lewis v. Chapman*, *supra*. The facts found by the jury, and above adverted to, bring the case at bar within the principle and the rule thus stated. The occasion was the courtship of the plaintiff, and the object of the letter was to give information of his character. It was written in confidence and in friendship to one sought by him in marriage, and thus having a vital interest in the subject, and written also in response to her request. These conditions seem to answer the first branch of the proposition laid down by Judge Selden in the Chapman case, *supra*, and by Judge Allen in the Sunderlin case, *supra*, and also bring the communication directly within the other branch of the rule. If we regard the communication as volunteered, it still remains that Dora, the party to whom the communication was made, had an interest in it, and the writer

stood, by reason of her intimate friendship and request, in such relation to her as to make it, at least, proper that the defendant should warn and put her on further inquiry.

"I think the communication was privileged by the occasion and by the position of the writer, and the court committed no error in refusing to charge otherwise. Whether the letter was in excess of privilege so conferred, I need not inquire, for such question was for the jury, and it was not raised at the trial.

"As to the second cause of action, the counsel for the appellant asked the court to charge: 'That the charges set out in the second count of the complaint have been substantially proved and stand uncontradicted, and the plaintiff is entitled to recover, and the only question for the jury is one of damages. The court declined so to hold and charge, and plaintiff's counsel duly excepted.' In this there was no error: 1. The allegations of the complaint are not admitted by the answer, but denied, and the plaintiff went into evidence to sustain the issue. 2. Between the plaintiff's witnesses and the evidence of the defendant there was a conflict. 3. The communication to Cameron was given in confidence, at his request, and under circumstances which might very well lead to the conclusion that Cameron, as the friend or even agent of the plaintiff, was by him put upon an inquiry, suggested by the letter just before read to him by the plaintiff: *Weatherstone v. Hawkins, supra*; *King v. Waring*, 5 Esp. 13. The statement was not voluntary, and the occasion of speaking, as well as the words spoken, were to be considered. The submission of it to the jury was proper (2 Greenl. Ev., sec. 421), and the language of the judge as applied to it was not inappropriate: *Weatherstone v. Hawkins, supra*. 4. Nor was it necessary to plead specially that the communication to Cameron was privileged. The defendant's answer alleged that the communication, such as it was, to Cameron was drawn out by him, — 'was a confidential communication, and was made without malice and without any intent to injure the plaintiff,' and in the belief of its truth, and denied, among other things, the allegation of malice contained in the complaint. This goes to the very root of the action. If true, it shows there was no malice; and as formerly the defense of privilege was open under the general issue, — *Hastings v. Lusk, supra*; *Howard v. Thompson*, 21 Wend. 324, — so it is now under the denial.

"The learned counsel for the appellant argues that the plea of justification set up as a separate defense was insufficient, because, he says, 'the matters alleged are stated to have been known at the commencement of the action, and not at the time of uttering or writing the words attributed to the defendant.' No objection was made to evidence on that account, and the question was only presented to the trial judge as he was about to give the case to the jury, and then in these words: 'That the court should hold, as a matter of law, that there is no sufficient plea of justification set up in the defendant's answers, and the proofs have not sufficient force to sustain a justification.'

"The proof shows that the defendant had heard the matters referred to when she wrote the letter, and no objection was made that the evidence was not competent under the answer. But the request when made was double, and required the court to pass upon the sufficiency of the evidence to sustain the justification as well as its final presentation upon the pleadings. One branch was for the jury, and upon both grounds the refusal of the court may stand. The other questions presented by the appellant were properly disposed of by the general term. The judgment appealed from should, I think, be affirmed."

WHEN PROOF OF ACTUAL MALICE must be made in action of libel: *Kent v. Bougartz*, 15 R. I. 72; 2 Am. St. Rep. 870, and cases collected in note 873. In an action for libel, if the words charged were spoken on an occasion which renders them *prima facie* privileged, the burden is on the plaintiff to show express malice: *Stewart v. Hall*, 83 Ky. 375.

DEFAMATORY AND LIBELOUS PUBLICATIONS, WHAT ARE: See *Stewart v. Swift Specific Co.*, 76 Ga. 280; 2 Am. St. Rep. 40, and note 43.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS: *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77, and note 79. Words spoken in a judicial proceeding, whether by a party, by a witness, or by counsel, are *prima facie* privileged: *Stewart v. Hall*, 83 Ky. 375; note to *Shadden v. McElhoee*, 6 Am. St. Rep. 825-828. A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause; when so made in good faith, the law does not imply malice, but actual malice must be proved, and whether communications are privileged or not is a question for the court, and not the jury: *Press Co. v. Stewart*, 119 Pa. St. 585.

BUSH v. ROBERTS.

[111 NEW YORK, 478.]

RES GESTÆ. — IN ORDER THAT THE DECLARATIONS OF A PARTY MAY BE ADMISSIBLE in evidence as part of a transaction, they must grow out of the principal fact or transaction, illustrate its character, be contemporaneous with it, and derive some degree of credit from it.

DECLARATIONS OF A GRANTOR MADE PRIOR TO HIS TRANSFER are not admissible against his grantee in an action by the creditors of the former to set aside the transfer for fraud, where it appears that the grantee was a purchaser for full value, and there is no other testimony tending to establish any complicity on his part in the grantor's fraudulent design.

ACTION by Bush, as administrator of Wakefield, to set aside for fraud, as against creditors, a conveyance of both real and personal property made by the defendant Robbins to his co-defendant, Roberts. The property was worth nine thousand one hundred dollars, and was sold for seven thousand five hundred dollars. Judgment for plaintiffs was affirmed by the general term.

Watson M. Rogers, for the appellant.

Thomas S. Jones, for the respondents.

GRAY, J. Various facts, which he decided to be proved by the evidence, led the learned trial judge to conclude that the transfer of property by the defendant Robbins to the defendant Roberts was made with the intent to hinder, delay, and defraud creditors, and therefore was void; but in the chain of evidence leading to his conclusion, which seems, so far as

it establishes knowledge in the vendee, not very weighty, was a conversation had between one of the plaintiffs and Robbins, shortly after the death of the intestate, and prior to the transfer of the property. The evidence of this conversation was elicited on the opening of the plaintiffs' case. Bush, one of the plaintiffs, had testified to a visit which he and his co-administrator had made to Robbins's house for the purpose of taking possession of the effects of their intestate, and that on that occasion he had a conversation with Robbins "upon the subject of the claims of this estate held against him and this property." He was asked by plaintiffs' counsel to state that conversation. This was objected to by counsel for defendant Roberts, who alone had appeared and was defending the action, on the ground that it was incompetent and immaterial as against that defendant; but the objection was overruled, and the evidence was received. The witness thereupon testified to the statements made by Robbins in the course of the conversation.

It seems to us evident that these statements were deemed of importance and material by the trial judge, because, in his ninth finding of fact, after stating the circumstances of the plaintiff's visit to Robbins's house, he incorporates them. He finds that plaintiffs "had conversation with defendant Robbins, who, in reply to questions put to him by Bush, one of the plaintiffs, informed them that he was a large debtor to said estate; that it had been allowed to run for years without interest being paid, and he did n't know just how much it was," and other facts which Robbins stated then about the quantity and value of his property. The materiality of the evidence of these declarations of Robbins obviously was in their bearing upon Roberts's solvency, and his motives and intent as deducible from his admissions, his misrepresentations, and his conduct. Roberts, however, was a purchaser for a valuable consideration, and there was no proof establishing any conspiracy between him and his vendor, Robbins, to defraud Robbins's creditors. The force of the action was directed against Roberts, to deprive him of the property which he had bought, and the action could only prevail by proof that he had actual notice of a fraudulent motive on Robbins's part, or knowledge of circumstances which was equivalent to such notice. If he knew or had believed the motives of his vendor to be fraudulent, then, by aiding him in his scheme, he made himself a party to the fraud: *Parker v. Conner*, 93

N. Y. 118; 45 Am. Rep. 178. But no evidence is competent proof to affect him, or his right to the possession of his property, which falls short of proving the nature of the transaction, and of illustrating the guilty participation of the vendee. If this was a case of a conspiracy to defraud Robbins's creditors, admitted or proved, the admissions or declarations of either would be competent as against the other; the principle of their admissibility assuming the fact of the conspiracy being established: *Cuyler v. McCartney*, 40 N. Y. 221-228. But this is not such a case, and no proof is admissible as against Roberts of acts or declarations of Robbins, unless as part of the *res gestæ*, or, unless falling within the rule of admissibility, as being against his, Roberts's, interest, and the fact that Robbins is a party defendant does not make them so.

In order that the declarations of a party, which are claimed to be part of the transaction, may be admissible, they must grow out of the principal fact or transaction, illustrate its character, be contemporaneous with it, and derive some degree of credit from it: *Lund v. Tyngsborough*, 9 Cush. 36. But proof of the declarations or misrepresentations of Robbins respecting his indebtedness and the value of his property, made before the transfer and before even the negotiations for any transfer, is not competent against Roberts; for they in no sense formed a part of the subsequent transaction between them, and their admission into the case to charge Roberts with the liability to restore the property is, we think, clearly a violation of the principles of evidence in such cases, and without support in authority.

The question here is, whether Roberts had actual notice of Robbins's intent, or the knowledge of circumstances connected with Robbins's act in disposing of his property to defraud his creditors. Did he, for his own advantage, or with no such idea, make himself a participant in the fraudulent plan? Unless the proofs are confined within the limits of charging Roberts with such a participation, the safeguards designed by the rules of jurisprudence as a protection to those who act in good faith and with honest motives are endangered. The trial judge found as facts the existence of the fraudulent intent in the vendor, Robbins, and of notice in the vendee, Roberts, of that intent; but these findings, it is manifest from his decision, rested more or less on the statements of the vendor to the plaintiff Bush. While expressing no opinion here

as to the general merits of the case, or as to the weight of the proof, we do say that, in a case of such a nature, where the proofs are conflicting, and not clearly preponderating against the defendant, the erroneous admission or exclusion of evidence was likely to have affected, in a material degree, the conclusions of the judge.

We see no reason why the principle of the decisions in the cases of *Tousley v. Barry*, 16 N. Y. 500, and of *Truax v. Slater*, 86 Id. 632, should not control in the present case. In *Tousley v. Barry*, *supra*, Johnson, C. J., decided that the admission of a previous owner of a chose in action cannot be proved against a purchaser from him, who has bought for a fair consideration, and between whom and the former owner there exists no other relation than that of purchaser and seller; that it was not the case of a nominal purchase, the former owner retaining the equitable interest, but of an actual and complete transfer of all interest to the purchaser.

In *Truax v. Slater*, *supra*, Earl, J., held that "the mere declarations of an assignor of a chose in action, forming no part of any *res gestæ*, are not competent to prejudice the title of his assignee, whether the assignee be one for value or merely a trustee for creditors, and whether such declarations be antecedent or subsequent to the assignment."

We think, for the error pointed out, the judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

DECLARATIONS AS PART OF RES GESTÆ: *Stockman v. State*, 24 Tex. App. 387; 5 Am. St. Rep. 894, and note 896.

KERNOCHAN v. MURRAY.

[111 NEW YORK, 306.]

PARTIES TO A CONTRACT ARE PRESUMED TO INTEND TO BIND THEIR PERSONAL REPRESENTATIVES as well as themselves.

CONTRACT OF GUARANTY DOES NOT TERMINATE WITH THE LIFE OF THE GUARANTOR, unless this intention is plainly expressed in the guaranty itself.

GUARANTY MADE BY PERSONS ACTING FOR AN UNDISCLOSED PRINCIPAL is an original and not a collateral undertaking. Their liability is not that of sureties, but of principals.

ACTION by Kernochan against Murray and others as executors of Richard M. De Mill, sole survivor, at the time imme-

diately preceding his death, of the firm of De Mill & Co., on the following contract of guaranty:—

“In consideration of your having purchased, upon my representation as to their value, forty shares of stock of the Albemarle Swamp Land Company, and of one dollar to me in hand paid, I do hereby guarantee that you shall receive, as long as you hold said stock, dividends equal to seven per cent per annum, or I will make good to you all deficit from such amount.

“NEW YORK, August 21, 1871.

DE MILL & Co.”

Judgment for defendants, which was affirmed by the general term.

J. F. Kernochan, for the appellant.

Sidney V. Lowell, for the respondents.

ANDREWS, J. We think the judgment below proceeds upon a misconstruction of the contract of guaranty. The guaranty did not, in terms, purport to bind the executors or administrators of De Mill & Co. But it is a presumption of law, in the absence of express words, that the parties to a contract intend to bind, not only themselves, but their personal representatives: 1 Parsons on Contracts, 530, and cases cited; Co. Lit. 209 a. In case of a contract for the payment of money, or the sale or purchase of property, or of a covenant of warranty, it would be an unreasonable supposition that the parties intended that the obligation should not survive against their representatives, although not specially named. It is, of course, competent for parties to agree that a contract shall not survive, and that all obligation under it should terminate on their death. So a contract may be of such a nature as to admit only of a personal performance, or as to imply that it is to be operative only during the continuance of personal relations, although not so expressed in terms, and will be deemed dissolved by death or other disability which renders performance, according to the intention, impossible. Contracts for the rendition of personal or professional services are of this character, and they terminate with the death or disability of the party owing them.

The guaranty in this case has no such personal quality. It was given by De Mill & Co. as an inducement to the plaintiff's testator to purchase from them forty shares of the stock of the Albemarle Swamp Land Company. They represented

the stock to be valuable, and claimed to be selling it for some parties who held it, and who desired to realize upon it, but whose names were not disclosed. They guaranteed that the plaintiff, so long as he held the stock, should receive dividends thereon equal to seven per cent per annum, and that they would make good any deficiency. The contract is plain and unambiguous. The obligation of De Mill & Co. was not limited in terms to the duration of the partnership or to the lives of the copartners. The only limitation of time was the period during which the purchaser should hold the stock. The guaranty protected the purchaser while his interest should continue, and this presumably was what he required, and both parties intended. Any other construction would subject the purchaser to the risk of losing the benefit of the guaranty on the death of the guarantors, which might happen at any time. There are cases cited holding that a continuing guaranty of advances to be made to a third party, in the absence of any express provision, is revoked as to subsequent advances by the death of the guarantor and notice: *Coulthart v. Clementson*, L. R. 5 Q. B. D. 42; *Harriss v. Fawcett*, L. R. 15 Eq. Cas. 311. These cases stand upon a perfectly equitable principle, each advance constituting a fresh consideration. But a guaranty creating a continuing pecuniary obligation, the consideration for which is entire and given once for all, is very different, and it would be very inequitable to hold that it was terminated by the death of the guarantor, unless this intention is plainly expressed in the guaranty itself: *Lloyd's v. Harper*, L. R. 16 Ch. D. 290.

The judgment in this case cannot, therefore, we think, be supported on the theory that the guaranty, by fair intendment, was limited to the lives of the guarantors. Equally unfounded, we think, is the claim of the defendants that De Mill & Co. were sureties, and for that reason their obligation terminated on their death: *Getty v. Binsse*, 49 N. Y. 385; 10 Am. Rep. 379. Their undertaking was original, and not collateral. They entered into the guaranty for their own benefit, upon a consideration moving to them as principals. If they were in fact acting as agents in selling this stock, not having disclosed their principal, they stood in respect to the purchaser as the owner and vendor: *Cobb v. Knapp*, 71 N. Y. 348; 27 Am. Rep. 51. In entering into the guaranty, they assumed no obligation resting on the company. The company was under no legal obligation to declare dividends to stockholders, and least

of all, to declare dividends of any particular amount. The contract of De Mill & Co. was clearly original, and they were principals, and not sureties.

We think the judgment should be reversed, and a new trial granted.

Judgment reversed.

COLLATERAL AND ORIGINAL UNDERTAKINGS, WHAT ARE: *Packer v. Benton*, 25 Conn. 343; 95 Am. Dec. 252, note; *Maurin v. Fogelberg*, 37 Minn. 23; 5 Am. St. Rep. 814.

CONTINUING GUARANTY: See *Cowles v. Peck*, 55 Conn. 251; 3 Am. St. Rep. 44, and note 48.

PEOPLE EX REL. UNION INSURANCE COMPANY OF PHILADELPHIA v. NASH.

[111 NEW YORK, 310.]

SUBMISSIONS TO ARBITRATION ARE REVOCABLE IN THEIR NATURE, and the parties cannot make that irrevocable which is of its own nature revocable.

AGREEMENT NOT TO REVOKE A SUBMISSION TO ARBITRATION will not deprive either of the parties of the power given him by section 2383 of the Code of Civil Procedure of New York to revoke such submission at any time before the closing of the proofs, and the final submission of the cause for decision.

APPLICATION for a writ of mandate to compel the respondents to proceed as arbitrators, chosen by the petitioner and Lorenzo Dimich, to decide certain controversies. The respondents showed that before these controversies were submitted to them, Dimich served on them a written revocation of their authority. But the petitioner claimed that Dimich had waived the right to make such revocation by the following clause in his agreement to submit to arbitration: "It is hereby further agreed by and between the said parties, in consideration of the agreements and covenants herein contained, to be kept and performed by the respective parties hereto, that neither of the parties hereto shall have the right to revoke the submission to arbitrators herein provided for, or this agreement, or any part thereof, and such arbitration shall not terminate or be revoked by the dissolution or death of either or any of the parties hereto, but in case of such dissolution or death of either or any of the parties hereto, during the pendency of such arbitration, the same shall continue against the personal representatives of such deceased person, or against the successor or

person or officer charged with the duty of administering the assets of such corporation, and any revocation by operation of law, and any and all right of revocation given or permitted by statute or otherwise is hereby expressly waived and abandoned." The application was denied at the special term, and such denial was affirmed on appeal to the general term.

Treadwell Cleveland, and Norris Morey, for the appellants.

S. P. Nash, James E. Carpenter, and William Allen Butler, for the respondents.

GRAY, J. The position taken by the appellants with respect to the agreement of arbitration in question here is, that the character of revocability, inherent in such submissions, is affected by that article of the agreement which provides against any revocation, and expressly waives and abandons the right to revoke. They do not dispute the common-law rule that submissions to arbitration are revocable in their nature, and indeed, that such was the rule is too well established and recognized by early and late English cases, and by the New York statutes and decisions, to admit of dispute: *Allen v. Watson*, 16 Johns. 205; *Bank v. Widner*, 11 Paige, 529; 2 R. S. 544, sec. 23; *Tobey v. County of Bristol*, 3 Story, 800; *Vynior's Case*, 8 Coke, 81 b (4th vol. of Frazer's ed. 302); *Marsh v. Bulteel*, 5 Barn. & Ald. 508; *Re Rouse v. Meier*, L. R. 6 Com. P. 212; *Fraser v. Ehrensperger*, L. R. 12 Q. B. D. 310. Whatever may have been decided elsewhere in this country, we are satisfied that that is the better rule of law which has been recognized in England and in this state, and which considers a submission revocable until its nature is changed by legal enactment, as was done by English statutes. As it was said in *Vynior's Case*, *supra*, "man cannot by his act make such authority, power, or warrant not countermandable which is by the law or its own nature countermandable"; he cannot "make that irrevocable which is of its own nature revocable."

But the learned counsel for the appellants say the facts underlying this submission, in the discontinuance of suits, the abandonment of advantages, and the peculiar and unusual agreements contained in this submission, by which the right to revoke is waived and abandoned, take it out of the common-law or statute rule. They say that here was an express waiver of the right to revoke, based on a valuable and executed consideration, and they argue that failing the reason of the rule, the rule itself fails.

No unusual character is imparted to the agreement by its being based on such a consideration. All such agreements must be based on a good consideration, and if the discontinuance of the pending suits and the loss of advantages thereby occasioned are the features which constitute the executed consideration, they are but the incidents of the agreement of submission. That was the decision of this court in *McNulty v. Solley*, 95 N. Y. 242, where Danforth, J., collects authorities to sustain the proposition that by submission to arbitration, *eo acto*, the discontinuance of the pending litigation is effected. The flaw in the argument of appellants' counsel is in its assumption that the character of the mandate to the individuals selected to determine the controversy between parties can be changed by their private agreements, or affected by the circumstances which were its producing cause, or which the execution of the agreement induced.

The source of the mandate or power, by virtue of which the arbitrators act, is in the private agreement which the parties have entered into, for reasons satisfactory to themselves, in order to have an end to dispute and to legal strife, and the force of the mandate to them is in the consent of the parties that they shall act. But in the execution of the power, or in the thing they are to accomplish, the arbitrators have no interest, and thus the case is altogether different from one where the mandatory has an interest in the execution of the power and in the result of its exercise. In such a case, the mandate, which goes forth with the execution and delivery of the agreement to the mandatory, becomes irrevocable. We are at a loss to understand how the nature of the agreement between the parties, or any resulting incident of that agreement, adds anything to the power of the arbitrators. The agreement of submission is executory until the controversy is completely ended between the parties by the submission to the arbitrators of the controversial facts for their decision; and not till then can it be said that the agreement has been executed and has passed beyond the power of the parties to withdraw from or to break. Until that ultimate stage has been reached, every article of the agreement which relates to the future conduct of the parties lies in the region of promise, and that promises can be and are broken, regardless of their weight or the consequences, is as proverbial as it is certain.

The express agreement not to revoke is executory of course, like every other agreement to do or not to do a certain thing.

Although the parties agreed not to revoke, the fact is that one of them has done so, notwithstanding his agreement, and the other is left to such legal remedies as may offer themselves to protect or compensate him for the breach. The agreement to waive any right to revoke does not help the situation. A waiver, to be effectual and beyond recall, must be of some present existing right, conferred by statute or otherwise. When the agreement to waive relates to the future conduct of the party, it is merely executory, and amounts to nothing more than the agreement not to revoke. The difficulty is, that as the arbitrators have no interest in the result of the arbitration, and derive their power to act from the continuing consent of the parties to the agreement, when the agreement, while yet executory, is broken by the refusal of a party to be bound by it or to perform it, the foundation of the arbitrator's power is gone, and they have no more authority over the withdrawing party to bind him by their acts.

The legislature of this state, in enacting section 2383 of the Code of Civil Procedure, have set at rest any existing conflict in the decisions, and have enlarged the rule as recognized in the previous statutory enactment: 2 R. S., p. 544, sec. 23. By its provisions, a submission to arbitration, whether made as prescribed in that title or otherwise, may be revoked at any time before the closing of the proofs and the final submission of the cause for decision. The revocation must be in writing, signed by the parties, and delivered to the arbitrators, and it is competent for one of several parties on a side to effect such a revocation. We perceive no reason for qualifying the force of this section in the way suggested by appellants' counsel, who say that it is only available to a party when revocation is allowable; and as by express agreements in this submission the right of revocation was stipulated away, the provisions of the section are inapplicable. We think the language of this section is broad enough to cover all cases of submission, and that the only restriction is as to the time and the mode of the act of revocation. And as to the agreement not to revoke, as we have suggested, like any other agreement relating to the future conduct of parties, it was executory, and, if broken, left the other party helpless thereunder, and under the necessity to seek redress for the breach elsewhere.

We have preferred to express our views upon the main conflict as to this submission, in view of its importance, and while doubting the power of the court to compel by writ of *manda-*

mus the performance by these arbitrators of their functions, we do not now express any opinion upon that question.

For the reasons expressed, we think the order of the general term affirming the order of the special term denying a motion for a peremptory *mandamus* should be affirmed, with costs.

Order affirmed.

AGREEMENTS TO SUBMIT TO ARBITRATION: *Commercial Union Assurance Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562, and extended note on subject 566-571. A notice of revocation, to be effective, must be served before an award has been agreed upon, and the fact that the award has not been reduced to writing when the notice was served is immaterial; *Buckwalter v. Russell*, 119 Pa. St. 495.

MORRIS v. BROWN.

[111 NEW YORK, 318.]

CONTRACTOR WHO HAS AGREED TO FURNISH FACILITIES FOR THE PURPOSE OF INSPECTING A TUNNEL ON WHICH HE IS AT WORK does not thereby obligate himself to furnish transportation to the persons engaged in the work of inspecting; and if they, without his invitation, ride into the tunnel on a car used to bring out stone and other material, he is not answerable to them for injuries suffered by them from the negligence of one of his servants in not controlling the velocity of a descending car.

1ST CARS ARE NOT FITTED NOR FURNISHED FOR CARRYING MEN, and there is nothing in their appearance or otherwise to invite a person to take passage therein, one who undertakes to ride therein, where there is no duty to carry him, and no invitation given him to ride, assumes all risks consequent on the condition of the car and track, or the omission or inattention of the servants in charge.

NEGLIGENCE IS THE OMISSION OF CARE OR CAUTION IN WHAT WE DO; but where there is no duty to be cautious and vigilant, there can be no negligence in the legal sense of the term.

MASTER IS NOT ANSWERABLE FOR THE ACT OR NEGLECT OF HIS SERVANT, when doing something which the master has not ordered done, if he has not authorized the servant to exercise a discretion in determining what to do.

WHERE SERVANT IS EMPLOYED TO MANAGE A DUMP-CAR hauling stone and other material out of a tunnel, he has no authority to assent to a third person riding in such car, and his permitting such person to so ride is not equivalent to an invitation by his master, and though frequently repeated, if without the knowledge of the master, it cannot make the master answerable for acts or omissions in the management of the car from which the person so riding is killed or suffers substantial injuries.

ACTION by the administratrix of Robert E. Morris for negligence resulting in his death. Verdict and judgment for plain-

tiff. New trial denied. Judgment and order affirmed by the general term.

Edward T. Lovett, for the appellants.

C. A. Kellogg, for the respondent.

DANFORTH, J. The defendants, under a contract with the aqueduct commissioners of the city of New York, were engaged at Croton dam in the construction of a tunnel by excavation. The decedent was a civil engineer in the employ of the commissioners, and it was his duty to inspect for them the work of the defendants, "to see that it was done in compliance with their contract," and the defendants bound themselves to furnish "all facilities for the purpose of inspection." The shaft had been opened about 350 feet on a descending grade, and the defendants had a track laid therein, over which, by the aid of a stationary engine and a cable attached thereto, and to open boxes or dump-cars, they drew out stone and other material broken off by blasting. The cars returned by gravitation at a speed intended to be regulated in part by a brake applied to a drum over which the cable ran. On the 24th of September, 1885, the decedent got upon the outside of one of these cars, and before reaching the end of the excavation was, through the omission of defendant's servant to attach the cable to the car, or otherwise control its velocity, thrown off and killed. At the close of the case, defendants' counsel asked for a dismissal of the complaint, upon the ground, among others, that the plaintiff had failed to show any duty or obligation on the part of the defendants to so manage the cars that they should be in safe condition, and run with care to prevent injury to the intestate. The request was refused, and the case submitted to the jury by the learned trial judge as one where, for negligence on the part of the defendant, and freedom from negligence on the part of the intestate, the plaintiff might recover. The plaintiff had a verdict. The important question upon this appeal is raised by the exception taken to the refusal of the trial judge to dismiss the complaint.

At the request of the defendants, the trial court charged the jury that "it is a matter of uncontradicted evidence that these cars were placed in this tunnel for the purpose of hauling out the *débris*, and not for the purpose of transporting passengers," and also, "in the absence of a duty on the part of the defendants to transport the deceased in and out of the tunnel,

he was a trespasser on the car." As thus presented, the question of contributory negligence becomes unimportant, but if it were otherwise, and that question fairly in the case, I should have no hesitation in saying that, under the evidence as to the circumstances and the conduct of the intestate, it was one proper for the consideration of the jury, and their conclusion upon it beyond the reach of this court. On the other hand, there is no suggestion of an intentional wrong practiced on the plaintiff, and the only question is, whether there was any duty on the part of the defendants to transport him into the tunnel, for it was while going in that he received injury. Of course, the learned judge did not use the term "passenger" as including only those who, for a consideration or otherwise, might acquire the right to be in or on the cars, but to emphasize by contrasting it with the term indicating material substances or matter which necessity or convenience required to be taken from the tunnel. We may start, then, with the proposition that the cars were not intended by the owners for the transportation of human beings.

But the contention of the plaintiff is: 1. That the car was one of the facilities for entering the tunnel, and under the contract the plaintiff entitled to its use; 2. That from the former use of the car there was an implied license that he might ride upon it, and therefore he was rightfully there. I am unable to find any foundation for the proposition.

It would not, I suppose, be claimed that, by this contract, the defendants were under any obligation to carry or furnish the intestate the means of carriage for himself from the place where his office or that of the commissioners might be, to the tunnel, whether that office was near to or remote from it.

Nor would the defendants be liable if, while they were running wagons for the transportation of tools or implements from their warehouse, the intestate had, by the acquiescence of the driver, often gone along, until finally, on the way to the tunnel, he received an injury by the overturning of the vehicle, through the negligence or carelessness of the driver. Nor would they be liable if the defendants themselves, going to the tunnel in a carriage driven by their servant, the intestate had got up behind, and the servant, knowing it, had driven carelessly and injured him. If, in either case, or in the case in hand, the mischief had resulted from the personal act of the defendants, done with knowledge of the intestate's presence, they would have been liable, and in either case the servant

might be; but I can find no reason or principle upon which the defendants could be charged, in the absence of some personal act, or some authority by them for the act of the servant. Clearly the inspector must find his way as best he could, and at his own risk, to the mouth of the tunnel. His duty of inspection began there. It was to continue until the tunnel was finished. At what point then, if at all, did the obligation of carriage fall upon the defendants? I cannot discover it, nor can I see how the conveyance of the engineer has any relation whatever to the defendants' duty to furnish facilities for inspection. If the shaft had been a rising one, or if the roof of the tunnel was so high that its condition could not be examined from below, it might be the duty of defendants to prepare a scaffold, or furnish a ladder or other means of access, for without one or the other, or some artificial means, the inspector could not approach the place to be inspected. But however that might be, the defendants could not be called on to carry him up the ladder or along the platform. The contract does not call for that accommodation.

So in the case before us it is plain, upon the testimony, that there was no obstruction in the way of the engineer's entrance into the tunnel, and that no facility was lacking to enable him to complete the work of inspection from the beginning to the end of the tunnel, as then constructed. At the mouth, or opening, the entrance was obvious, and step by step the inspection could have been made, precisely as well and as thoroughly as if the inspector had gone in on a railroad.

There was no impediment. The duty of inspection seems to have been confided to the engineers Ridgway, Larned, Gallery, and the decedent. From the testimony of the survivors, it appears that the gauge of the track was three feet and a half, the theoretical width of the tunnel twelve feet, and its actual width not uniform. The distance between the track and the sides of the tunnel also varies; on the right-hand side it is from four to four and a half feet and six feet. The space on the left-hand side is mainly occupied by the air-shaft. The track was single, cars going at intervals as occasion required, but only in one direction at any one time. The track and the space outside of the track was, therefore, available for the inspectors. Moreover, they did, in fact, usually and habitually, although not always, avail themselves of that space, and travel in and out on foot. It was comparatively seldom that either rode upon a car. Ridgway says: "We

could walk down through the roadway. I walked most of the time myself, and was accustomed to see the men walking out of the tunnel and walking in. One could walk on the track or by the side. It is only a question of ease. I can go from one end of the incline to another on foot and do my work, and I do do it, and have been doing it since I went on the work,—January, 1885.” Larned walked backward and forward to his work; in doing so, used the track. Webster, a civil engineer employed by defendants, and of twenty-four years’ experience in such work, says: “I have never ridden on these cars. I have gone in and out always on foot.” Gowen, also a civil engineer employed on the work by the commission, and called by the plaintiff, said: “I did not regard those cars as facilities or means for taking people down or bringing them up. I regard them particularly for bringing out *débris* and rocks from the heading.” There was nothing in the appearance of the cars to serve as an invitation to man. They were unprovided with seats, were wet from the drip of water, and dirty from the loads they carried. As they were not furnished for such use, so there was no permission from the defendants, or any one of them, that they might be so used. But it is said this permission might be implied, because the intestate and others had before ridden upon the cars. Without permission from or duty on the part of the defendants to give it, I cannot see how that result follows. On the contrary, a person so using the car at each time took upon himself the risk, and must abide by its condition and the quality of the attendant at the time he so used it, and was entitled only not to be led into danger.

Negligence is an omission of care and caution in what we do. But the duty to be actively cautious and vigilant is relative, and where that duty has no existence between particular parties, there can be no such thing as negligence, in the legal sense of the term. The plaintiff was in no position to complain of the defendants or their servants. The frame and dump the intestate got upon was not a vehicle for his carriage, but an instrument of labor, a mere implement furnished by the defendants to their servants, as they might have provided a man with a basket or barrow, or a mule with panniers, to take out the refuse, as in former times was the custom in doing such work. It might have been a scraper or dirt-shovel, or stone-boat or dump-cart drawn by horses. In either case, would the owner be liable to one who, seeking

to use the machine for convenience in personal transportation, received an injury? Certainly not. Nor can he make out a better case, because, by the combination of a rail, wheels, and stationary power, the same work is done, but more easily.

The benefit of the contract between the defendants and the aqueduct commissioners no doubt extended to the plaintiff's intestate and the other agents of the commissioners; but if I am right in its construction, no liability arose from that contract to furnish the track or car, or other means of entering the tunnel, or do more than not to obstruct the entrance of the commissioners or their agents, and I find nothing else to show how any liability or duty to the plaintiff could arise. However imperfect the track or the car, or however negligent or careless its manager may have been, they were not, singly or in combination, dangerous; nor would the plaintiff's intestate have been harmed if he had kept away from them. If, in going out of or entering the tunnel, or while engaged in the duty of inspection, he had been run over by the car, either from the careless management of the servant of the defendant having it in charge, or from its leaving the track by reason of the imperfection either of the track or the car, a different question would have been presented, one which might well be answered in his favor upon the principles applied in the cases now cited in his behalf, viz.: *Byrne v. New York Central etc. R. R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512; *Weinhold v. Acker*, 49 N. Y. Sup. Ct. 182; *Ackert v. Lansing*, 59 N. Y. 646; and also *Wendell v. Baxter*, 12 Gray, 494.

The actual case is different. The plaintiff had a right to be in the tunnel for its inspection. The contract put the defendants under no obligation to carry him into the tunnel, nor by it did he acquire any right to be upon the car. Nor did he acquire that right through any consent or act or acquiescence on the part of the defendants. All the witnesses agree that no permission was given by the defendants; no evidence tends to show that they even knew the car was at any time so used. The brakeman of the car had known it, but neither his knowledge nor assent could bind the defendants. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant only when he acts in the execution of the authority given him. Here the servant had only to go up with loads of stone or dirt and return with the empty cars, the easiest and simplest of duties, with little responsibility, and engaged in an employ-

ment requiring only a low degree of intelligence, his discretion at any rate limited to the care and proper disposition of the loads intrusted to him,—his position inferior to that of the driver of the wagon or carriage in the cases I have supposed. There is nothing whatever in the record to show that in not resisting the intestate's entrance upon the car, or in consenting to it, he was acting in pursuance of any authority conferred on him. He had nothing to do, and could, in the nature of things, have nothing to do, with human freight.

The law, for reasons of convenience, makes a master liable for the act of his servant, even though the servant, in the performance of his duty, is guilty of a deviation, or a failure to perform it in the safest or best manner, "but where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of his servant in doing it": *Mitchell v. Crassweller*, 13 Com. B. 247; or, as it is elsewhere stated, "where the master has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how in common justice or common sense the master can be held responsible": *McKenzie v. McLeod*, 10 Bing. 385. In the case before us, the brakeman was never told or authorized to carry any person, and if he acquiesced in, or by silence consented to the intestate's going in upon the cars, there is no evidence that in doing so he was acting in the line of his duty, or within the scope of his employment. The deceased had in fact ridden upon the car; he had done so under no other permission, a volunteer, but in safety. In each instance, however, he must be deemed to have assumed the risk, and this last time he was unfortunate. The consequences of that misfortune should not be thrown upon the defendants.

In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, the general proposition is maintained that "where the owner of land expressly, or by implication, invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who at the time is exercising ordinary care, such owner is answerable for the consequences." It is also said, however, "if he gives but a bare permission to cross the premises, the licensee takes the risk of accidents in using the premises in the condition in which they are." Among other

cases cited is that of *Hounsell v. Smyth*, 7 Com. B., N. S., 731, in which, in denying a recovery, the court said: "No right is alleged; it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. He must take the permission with the concomitant conditions, and it may be perils."

The case at bar lacks even the elements which are so referred to. The plaintiff asserts a right, but has not established it. He does not show that the owners allowed any one to go upon the machine; he simply shows that the inferior servant employed to manage a dump-car did not interfere with those persons who got upon it. In the principal case, *Beck v. Carter*, *supra*, a recovery was allowed, because, by use long continued, the land where the accident occurred had been made, for the time being, a public place, and part of the highway.

In *Sutton v. New York Central etc. R. R. Co.*, 66 N. Y. 243, it is held that although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it raises no duty to active vigilance to those crossing to guard them from accident; that the licensees under it take the risk of the business. Nothing more can be said in favor of the intestate than that, so far as the machine is concerned, he was upon it by the tacit permission of the defendants' employee; and as between himself and the defendant he was bound to take the equipage as he found it, and the driver or servant with such skill and care as for the time being he exercised. He chose between the machine so equipped and managed, and going in on his own feet. The defendants are in no view to blame either for his choice or for the evil results. On the contrary, the intestate was in the attitude of one consenting to bear a risk as a volunteer, a guest, a servant, or bare licensee, and the principle on which cases relating to those classes are determined apply to him. In *Gillshannon v. Railroad Co.*, 10 Cush. 228, a laborer on defendants' road while riding on a gravel train, by defendants' consent and for mutual convenience, to his place of labor, was injured by a collision caused by the negligence of the company's servants in charge of the train, and it was held that no action would lie against the company, although both servants were not in a common employment. The court were against a recovery, upon two

grounds: 1. The immunity of the master from liability to a servant for injuries caused by the negligence of a co-servant; 2. Because he was injured while enjoying a privilege merely permitted to him, and of which he availed himself to facilitate his own labor. The first ground has no application here, but the plaintiff's intestate is within the last alternative. The defendants' business did not concern him, nor was the machine or manager provided for his use, and it would be great injustice to hold the defendants liable for an injury to one whose presence at the place of danger was unsolicited, and for whose safety there was no reason within their knowledge to provide. The case of *Eaton v. Delaware, Lackawanna, and Western R. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513, is an authority more in point than those before cited. After an elaborate discussion, it is there held that conductors of freight trains cannot create any liability on the part of their principals to a person taken by them on such trains, unless the principal in some way assents to it, and that a duty to be careful toward him could only spring up on the part of the principal by an act on the conductor's part, coming within the scope of his authority. It is therefore unnecessary to pursue the subject further, and as we are of the opinion that there was no testimony showing either that the defendants permitted the intestate to use the cars as a means of entering the shaft, or of any duty owing by them in that respect, but on the contrary that he voluntarily assumed the risk from which he suffered, we are constrained to hold that the learned trial judge erred in submitting the case to the jury.

FAILURE TO PERFORM DUTY WHICH IS WELL DEFINED IS NEGLIGENCE:
Arnold v. Penn. R. R. Co., 115 Pa. St. 135; 2 Am. St. Rep. 542.

LIABILITY OF RAILROAD COMPANY FOR INJURIES SUSTAINED BY ONE WHILE RIDING AS PASSENGER ON A HAND-CAR under invitation of an employee of the company: See *International etc. R. R. Co. v. Cock*, 68 Tex. 713; 2 Am. St. Rep. 521, and note 524.

WHERE IT IS A PUBLISHED RULE of a railway company that passengers are forbidden to ride on through freight trains, the fact that the rule has often been violated does not deprive the company of the right to begin its enforcement whenever it may deem it proper to do so; and one who boards a freight train, which has no appearance of being held out for the accommodation of passengers, may be ejected from it by the conductor: *Hobbs v. T. & P. R'y Co.*, 49 Ark. 357.

LIABILITY OF MASTER TO THIRD PERSONS FOR ACTS and negligence of servants, generally: See *Muse v. Stern*, 82 Va. 33; 3 Am. St. Rep. 77. If, through the omission of a servant engaged in the business of driving the horse of his master to be watchful at all places, he does not see a person

crossing at a point where there is no cross-walk, or if seeing him he fails to stop the horse in time, when with proper care he might have done so, and the latter is injured without fault or negligence on his part, the master is liable for the damage: *Moebus v. Herrmann*, 108 N. Y. 349. But the liability of the master does not reach wrongs caused by carelessness of servants in work not directed by the master, as business of a third party, or of the servant himself, or of the master which he did not expressly or impliedly direct him to perform. In other words, the responsibility of the master grows out of and is measured by and begins and ends with his control of the servant: *Wiltse v. Bridge Co.*, 63 Mich. 639.

DEOBOLD v. OPPERMANN.

[111 NEW YORK, 531.]

SURETIES OF AN ADMINISTRATOR ARE IN PRIVACY WITH HIM, AND ARE BOUND BY ANY LAWFUL ORDER made by the surrogate to which the administrator is a party, unless obtained by collusion between him and the heirs or creditors of the estate. Their bond contemplates that they shall remain sureties as long as the surrogate retains jurisdiction of the proceedings in the administration of the estate, and has power to make valid orders therein affecting the property administered upon.

SURETIES ON AN ADMINISTRATION BOND ARE NOT ENTITLED TO NOTICE OF PROCEEDINGS in the administration of the estate.

CONTRACT BETWEEN AN ADMINISTRATOR AND HIS SURETIES, THAT THE LATTER MAY RETAIN POSSESSION OF THE FUNDS OF THE ESTATE to secure them from the possibility of loss as such sureties, is illegal and void.

EMPLOYMENT BY ADMINISTRATOR OF FUNDS OF THE ESTATE in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial, or manufacturing enterprises or speculative adventures, is illegal, and a *devastavit* of the estate.

SURETIES OF AN ADMINISTRATOR REMAIN LIABLE, NOTWITHSTANDING A DECREE adjusting his accounts and discharging him and them from liability, if such decree is afterwards vacated for fraud and misrepresentation, though without notice to them, and though they, in the mean time, acting in good faith and in reliance upon such decree, have paid over to the administrator the funds of the estate, which he had pursuant to agreement placed in their hands to secure them from liability as his sureties.

A PARTY IS NOT DEFRAUDED WHEN INDUCED BY ARTIFICE TO DO that which the law would have compelled him to do.

ACTION against the sureties of Louisa Deobold, administratrix of Henry Deobold. Verdict and judgment for plaintiff, and order denying new trial, all affirmed by the general term.

Ashbel P. Fitch, for the appellants.

George F. Langbein, for the respondent.

RUGER, C. J. This action was brought by the plaintiff as executor of the estate of his mother, Maria Deobold, to recover from the defendants as sureties upon the bond of Louisa Deo-

bold, given upon her appointment as administratrix of the estate of her husband, Henry Deobold, a sum of money ordered by the surrogate to be paid to Maria Deobold, as mother and next of kin to the intestate, but which the administratrix refused or neglected to pay. The trial court directed a verdict for the plaintiff, and the judgment entered thereon was affirmed upon appeal. The supreme court having granted leave to appeal to this court, the matter comes here for review.

The record presents the following facts, the evidence being practically undisputed: Prior to January 16, 1880, Henry Deobold, a resident of the city of New York, died possessed of personal property of the value of about three thousand three hundred dollars, and leaving him surviving his widow, Louisa Deobold, his mother, Maria Deobold, and brother Philip Deobold, next of kin. On that day the surrogate of New York issued letters of administration upon the estate to the widow, Louisa Deobold, and the defendants became sureties upon her bond for the faithful performance of her duties as such. On December 9, 1882, upon a general accounting before the surrogate by the administratrix, he made a decree finally adjusting her accounts, and discharging the administratrix and her sureties from their bond.

This decree purported to have been based upon a written waiver of notice of the settlement of the estate, signed by Maria and Philip Deobold, and a written assignment by them to the administratrix, of all their right, title, and interest in the estate of the deceased. Proceedings were thereafter begun by Maria and Philip in surrogate's court on January 9, 1883, to set aside the decree rendered on final accounting, upon the ground that it was fraudulently obtained, and that the assignment and waiver of citation were procured from them by the administratrix through fraud and misrepresentation. Such proceedings were thereupon had that the surrogate, on February 20, 1883, made an order vacating and in all respects setting aside the decree, and the defendants were immediately thereafter served with a copy of such order. Subsequently, upon a further accounting, the surrogate made an order directing the administratrix to pay to Maria Deobold the sum of two hundred dollars, and she refusing to pay the same, the surrogate made a further order directing the prosecution of the defendant's bond for the recovery of the amount so ordered to be paid. This suit was brought in pursuance of the latter order.

It further appeared that before consenting to act as sureties upon the bond of Louisa Deobold, the defendants required her to deposit with them the entire proceeds of the estate, to be retained until they were discharged from liability upon the bond, and an agreement to that effect was made between her and the defendants. No security was given to the administratrix for the repayment of these moneys by the defendants; and by the understanding of the parties, they were to pay interest thereon, and were authorized to use them in their business as brewers. Under this arrangement, the administratrix, at the time of the execution of the bond, in January, 1880, deposited with the defendants the sum of three thousand three hundred dollars, the funds of the estate, which they employed in their business until January 16, 1883, when it was repaid by them, together with a loan of two thousand nine hundred dollars, and interest, to Louisa Deobold. This payment was made by the defendants after an examination of the decree of the surrogate of December 9, 1882, discharging them from liability on the bond, and after an inspection of the papers upon which such decree was founded. It did not appear that the defendants had actual notice of the proceedings previously instituted by Philip and Maria Deobold to set aside such decree for fraud, or that they were made parties thereto.

It further appeared that in actions instituted on behalf of Philip and Maria Deobold against the administratrix in the court of common pleas of New York, judgments had been obtained by the plaintiffs, respectively, vacating and setting aside the assignments before referred to as fraudulent and void.

Two questions are presented by the appellants as grounds for the reversal of the judgment below, which may be briefly stated as follows: 1. That the surrogate could not reinstate the defendants in their liability as sureties upon their bond in proceedings to which they were not parties; and 2. That the agreement by which they were made the custodians of the funds of the estate was binding and lawful, and authorized them to retain them until after the discharge of such bond.

As the corollary of the latter proposition, it is urged that having the right to retain them, and having paid them out, relying upon the assignment and decree of the surrogate based thereon, the defendants were relieved from the obligation of repaying the same moneys to the plaintiff in this action. We are of the opinion that the claims of the defendants are not

maintainable. No question is made but that the surrogate had ample power to set aside his decree for fraud, and require a further accounting by the administratrix as to the estate: Laws of 1870, sec. 1, c. 359; but the claim is, that the sureties were not bound by the subsequent adjudications of the surrogate, for the reason that they did not have notice of the proceeding.

This claim is clearly untenable. The decree discharging the administratrix and her sureties was, when **made**, assailable by any party thereby aggrieved, either by **motion** to set it aside, or by proceedings on appeal. In neither case was it necessary that the sureties should have notice of the proceeding. The sureties are the privies of the administratrix, and are precluded from questioning any lawful order made by the surrogate in a proceeding wherein she is a party, if obtained without collusion between such administratrix and the next of kin, or creditors of the estate: *Scofield v. Churchill*, 72 N. Y. 565; *Gerould v. Wilson*, 81 Id. 583.

Their bond contemplates that they shall remain sureties as long as the surrogate retains jurisdiction of the proceedings in administration of the estate, and has power to make valid orders therein affecting the property administered upon.

Of course the sureties would not be bound by an order which the surrogate had no jurisdiction to make; but so long as his jurisdiction continues the liability of the sureties remains. The very language of the bond provides for orders made in proceedings *inter alios*, and for the liability of the sureties for a non-performance by the administratrix of any decree or order made by the surrogate's court. The condition of the bond is, that liability shall follow her infidelity to her trust, or disobedience of any lawful order or decree whenever made in the proceedings.

It was, we think, never heard of in practice that sureties on an administrator's bond should have notice of proceedings in the administration of an intestate's estate.

It could not be claimed that these sureties were entitled to notice of an appeal from the surrogate's decree, or that if an appeal was taken from a decree in favor of an administrator and the decree should be reversed, they would not still remain liable upon their bond. Such bonds are similar to those given in civil actions upon appeals and otherwise, and have always been held to abide the result of the action.

The real question, therefore, is as to the legality of the

arrangement made with the defendants in respect to the custody and use of the funds of the estate during the pendency of proceedings in administration, and the effect of the repayment of such moneys by the defendants to the administratrix under the circumstances disclosed in the case. We are of the opinion that any employment of trust funds for the individual benefit of a trustee is forbidden by the rules of equity, and constitutes a *devastavit* authorizing the removal of the trustee, and the reclamation of such funds from any one receiving them with knowledge of their character. The employment and use of such moneys by executors, administrators, and other trustees during the continuance of the trust, has been from the earliest times the subject of frequent consideration by the courts, and their decisions have displayed a uniform tendency towards that mode of use which should afford the greatest security to the fund. Their employment by the trustees in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial, and manufacturing enterprises or speculative adventures, has been uniformly condemned as illegal, and as constituting a *devastavit* of the estate: *Wilmerding v. McKesson*, 103 N. Y. 336; *King v. Talbot*, 40 Id. 90; *Fellows v. Longyor*, 91 Id. 324; *Wetmore v. Porter*, 92 Id. 76.

So, too, it is the uniform doctrine of the cases that trust funds so invested by the trustees in the hands of third persons, having knowledge of their trust character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed by suit in the name of their trustees, or in that of the beneficiaries of the trust, and restored to the trust fund: *Wilmerding v. McKesson*, *supra*; *Wetmore v. Porter*, *supra*; *Rogers v. Squires*, 98 N. Y. 50; *Clark v. Hougham*, 2 Barn. & C. 149; *Perry on Trusts*, secs. 828-832; *Williams on Executors*, 801; *Field v. Schieffelin*, 7 Johns. Ch. 150; 11 Am. Dec. 441.

Neither can the transferee of such funds from an executor or trustee protect himself from an action brought by the trustee to reclaim them, by showing that such trustee was a legatee under the will, or next of kin to the intestate, and thus entitled to an interest in the fund: *Perry on Trusts*, sec. 811. Such interest can become a legal right in any part of such fund only after administration has been had, and the decree of the court has provided for division and distribution according to the rules regulating such proceedings.

We conceive it to be beyond the power of an executor or administrator to bind the estate he represents, to any use of its funds, by contract with third persons having knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its objects. The bond in question was executed for the sole purpose of securing the persons interested in the property the administratrix was about to receive from any loss which they might sustain through her misconduct or dishonesty, and the defendants were well aware of the character of the transaction. The defendants thereby contracted to become sureties for the faithful performance by her of her duties as such administratrix, and the beneficiaries of the estate thereupon became, under the theory of the law, entitled, not only to the security afforded by the bond, but also to that of the funds of the estate remaining in the hands of the administratrix. If this transaction is sanctioned, one of the securities that the law provides to such persons is entirely destroyed, and the funds of the estate are merged in the personal responsibility of the sureties alone, subject to the hazard and casualties which so often attend persons engaged in trade. Estates in the hands of administrators are always supposed to be under the immediate control of the surrogate's court, and subject from day to day to such orders as it may make in relation thereto. It would be contrary to the policy of the law to allow an administrator, at the outset of his administration, by contract, to place the funds of the estate beyond the reach of the court, and irreclaimable until after all the duties of administration have been performed by the administrator. It would certainly be no excuse to an administrator for disobedience to an order of the surrogate, as to the disposition of any portion of the estate, to allege that it was impossible for him to obey, because he had placed its funds out of his possession. Neither would it be any defense to a third person, in an action by any one having authority to recover possession of such funds, to plead that he held them by virtue of a contract, with a former trustee, entered into with him as such trustee.

We think this proposition was decided in *Poultney v. Randall*, 9 Bosw. 236. There the general guardian of an infant sued the defendant for moneys collected by such defendant, belonging to the estate of the infant, under a power of attorney from the guardian. The defense set up was that he held the money, by virtue of a contract with the guardian to so

hold it, as security for his obligation upon the guardian's bond, and that the guardian was insolvent. The court held that the facts pleaded constituted no defense, and that the contract was void upon considerations of public policy, and a fraud upon the statute requiring security for the due performance by the guardian of his duties as such.

We can see no material distinction between that case and the case at bar, and approve of the reasons therein alleged for the decision. The case of *Wilder v. Butterfield*, 50 How. Pr. 385, is to a similar effect.

But it is claimed that the surrender, after the decree canceling the administratrix's bond, of the funds of the estate held by the defendants, to the administratrix, operates as a defense to this action. The principle upon which the appellants make this point is not very clearly presented in their brief, and we are unable to see the exact theory upon which it is based. They do not claim that the plaintiff is estopped from alleging the invalidity of the assignment or of the decree, upon the faith of which the payment was made. They claim, however, that "of two innocent parties, that one must suffer who puts it in the power of the third person to do the act which caused the injury."

This contention is probably based upon the familiar maxim that "when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed": Abbott's Digest, vol. 8, maxim 84, and vol. 4, maxim 382. This maxim has been applied and illustrated in numerous cases in this state, among which are the following: *Spraight v. Hawley*, 39 N. Y. 441; 100 Am. Dec. 452; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Griswold v. Haven*, 25 Id. 595; 82 Am. Dec. 380; *Exchange Bank v. Monteath*, 26 N. Y. 505; *Sandford v. Handy*, 23 Wend. 268; *Root v. French*, 13 Id. 572; 28 Am. Dec. 482; *Voorhis v. Olmstead*, 66 N. Y. 116.

These cases generally relate to the authority of agents whose right to deal with the property of their principals was in dispute, and the maxim has been applied by reason of various peculiar circumstances, which were deemed sufficient to preclude the principal from availing himself of the agent's want of actual authority; but the general principle involved has been applied in many cases where a loss has followed from the negligence of one party which enabled a fraud to be committed upon another. We are of the opinion that the maxim

has no application to the case in hand, for the reason that no actionable fraud has been shown to have been committed upon the defendants in this transaction, nor has any loss occurred to them in consequence of the surrender of the money referred to. It is probably true that the defendants would not have surrendered to the administratrix the funds of the estate in their possession, or have repaid to her the debt which they owed her, except for the decree produced for their inspection; but it is also very clear that they had no right to retain such funds by virtue of their contract with the administratrix, and there was no intention to commit a fraud upon them by the administratrix, in obtaining possession of property to which she was legally entitled. She was entitled to the repayment of her loan as a matter of course; for she held a promissory note therefor, payable on demand, and no possible defense could be made to its collection. Neither, as we have seen, could they have resisted a claim made by her or others for the reclamation of the money of the estate.

They have done nothing, therefore, in consequence of the decree, except what they were under legal obligation to do, and have therefore suffered no legal loss or injury from the transaction. The surrender of the property in question would not even have furnished a good consideration for a promise made by the administratrix: *Vanderbilt v. Schreyer*, 91 N. Y. 392. It is of the very essence of an action of fraud or deceit that the same should be accompanied by damage, and neither *damnum absque injuria* nor *injuria absque damnum*, by themselves, constitute a good cause of action: *Hutchins v. Hutchins*, 7 Hill, 104; *Michigan v. Phoenix Bank*, 33 N. Y. 9. Neither can a party claim to have been defrauded who has been induced by artifice to do that which the law would have otherwise compelled him to perform: *Thompson v. Menck*, 2 Keyes, 82; *Story v. Conger*, 36 N. Y. 673; 93 Am. Dec. 546; *Randall v. Hazeltine*, 12 Allen, 412.

The defendants may possibly lose the money which they pay in satisfaction of their bond, but this will result from their contract, and the confidence reposed by them in their principal, and not at all from the surrender of the property held by them. It is not probable, however, that they will lose anything, as for all that appears their principal is perfectly responsible, and liable to indemnify them for any sums they may be obliged to pay on her account.

It affirmatively appears that in January, 1883, she not only

had in her possession all the funds of the estate, but also the additional sum of upwards of three thousand dollars, the result of her own savings during the preceding two or three years, and being an amount largely exceeding the liability of the defendants on their bond.

The main question in the case really seems to be, Who shall pursue the administratrix for the moneys of the estate improperly retained by her? We think it is the duty of the defendants, as the object of their bond was to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest, negligent, or absconding administrator. We are further of the opinion that the defendants are precluded from the benefit of the principle contained in the maxim by reason of the obligations of their bond. They are the privies of their principal, and the guarantors of their fidelity in the administration of her trust.

The decree under which the defendants claim discharge from liability was procured by fraud practiced upon the surrogate through the presentation of papers fraudulently obtained and used by her. It was against the perpetration of such frauds that the defendants' bond was intended to protect the beneficiaries of the estate. The defendants had covenanted that the administratrix should faithfully execute the trust reposed in her, and obey all lawful decrees and orders of the surrogate's court. When she obtained through fraud the order of the surrogate awarding the moneys of the estate to her, and canceling her bond, she violated the obligations of her trust, and the defendants became liable for the damages flowing from such breach of duty. That the defendants were deceived by the administratrix constituted no protection to them; for they had guaranteed that she should deceive nobody in the administration of her trust. The liability of the sureties is co-extensive with that of the administratrix, and embraces the performance of every duty she is called upon to discharge in the course of administration.

It is quite absurd to say that the very fact which creates a cause of action against the sureties should also operate as a defense to them. They cannot stand as innocent parties in relation to an act which they have covenanted to the plaintiff, and all others interested, should never be performed. And they have sustained no legal loss when subjected to a liability which they agreed to assume in the event which is now alleged as the cause of their misfortune.

We are therefore of the opinion that the judgments below should be affirmed, with costs.

Judgment affirmed.

LIABILITY OF EXECUTOR OR ADMINISTRATOR FOR LOSS OF TRUST PROPERTY:
Rubottom v. Morrow, 24 Ind. 202; 87 Am. Dec. 326, 327, note; *Davis v. Chapman*, 83 Va. 67; 5 Am. St. Rep. 251; *Norwood v. Harness*, 98 Ind. 134; 49 Am. Rep. 739.

HOW FAR JUDGMENT OR DECREE AGAINST EXECUTOR OR ADMINISTRATOR CONCLUDES the sureties on his bond: See *Lipscomb v. Postell*, 38 Miss. 476; 77 Am. Dec. 651; *Charles v. Hoskins*, 14 Iowa, 471; 83 Am. Dec. 378, and note 383. The negligence of the administrator of the estate of a decedent, who has succeeded a former administrator, to collect from the latter a balance found to be due from him to the estate upon the settlement of his accounts, does not release the sureties on the bond of the former administrator from liability on the same for such balance: *In re Estate of Connolly*, 73 Cal. 423.

CONSTANT v. UNIVERSITY OF ROCHESTER.

[111 NEW YORK, 604.]

ONE IS ENTITLED TO BE REGARDED AS A MORTGAGEE FOR A VALUABLE CONSIDERATION who surrenders therefor a prior mortgage with the accrued interest thereon.

PRINCIPAL IS NOT AFFECTED BY THE KNOWLEDGE OF HIS AGENT, obtained in a different transaction, and while acting for another principal, unless it first be shown that such knowledge was present in the mind of the agent at the very time of the transaction now in question.

BURDEN IS UPON PARTY SEEKING TO CHARGE A PRINCIPAL WITH KNOWLEDGE OBTAINED BY HIS AGENT IN ANOTHER TRANSACTION, while acting for a different principal, to prove that such knowledge remained present in the mind of the agent at the time of the transaction in relation to which notice is sought to be imputed to the principal.

NOTICE OF FIRST MORTGAGE IS NOT IMPUTED TO A SECOND MORTGAGEE because his agent, who negotiated and took the second mortgage, acted in a like capacity in respect to the first mortgage, unless it is shown that the agent, when taking the second mortgage, had the first mortgage present in his mind, and did not proceed in the belief that it had ceased to be an existing and valid lien on the mortgaged premises.

ACTION to foreclose a mortgage made by Elizabeth Meehen and husband. The defendant, the University of Rochester, claimed title to the mortgaged premises, under the foreclosure of a second mortgage made to it by the same mortgagors, and that it had no notice of plaintiff's mortgage. Judgment at special term for plaintiff was affirmed at the general term.

Martin W. Cooke, for the appellant.

John E. Parsons, for the respondents.

PECKHAM, J. In taking the mortgage of January, 1884, we think the university occupied the position of a mortgagee for a valuable consideration. It surrendered a prior mortgage, with the accrued interest thereon, and took the mortgage in question. If the university be not chargeable with notice of the prior mortgage to Constant, which was unrecorded, then its own mortgage is the prior lien as between the two. The first important question arising is, Did Deane, who acted in the transaction as the attorney and agent for the university at the time of the execution of the mortgage to the university, have knowledge of the existence of the prior mortgage to Constant, executed in February, 1883, and which he then took as agent for Constant? In other words, is there any proof that he, in January, 1884, had that fact present in his mind and recollection, so that it can be said from the evidence that he then had knowledge of its existence as an unpaid, outstanding obligation? The transaction out of which the mortgage to the university arose occurred eleven months subsequent to the transaction out of which the mortgage in suit arose; and the former mortgage was neither a part of the same transaction as the latter, nor had it the least connection therewith. Under the law as decided by the older cases in England, such fact would have been an absolute defense to the claim that there was any constructive notice to the defendant arising out of notice to its agent, because such notice was in another and entirely separate transaction. In *Warrick v. Warrick*, 3 Atk. 291, 294, decided by Lord Chancellor Hardwicke in 1745, that able judge assumed it as unquestioned law that notice to the agent, in order to bind his principal by constructive notice, should be in the same transaction. He said: "This rule ought to be adhered to; otherwise it would make purchasers' and mortgagees' title depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." Cases were continually arising subsequent to that case, wherein the principle was assumed as the law of England, although the cases did not in their facts absolutely call for a decision on that point.

But in *Mountford v. Scott*, 1 Turn. & R. 274, upon an appeal from a decision of the vice-chancellor, Lord Chancellor Eldon said that the vice-chancellor proceeded upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction. The lord chancellor

continued: "In that view of the case, it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it." He further said that he would be unwilling to go so far as to say that if an attorney has notice of a transaction in the morning, he shall be held, in a court of equity, to have forgotten it in the evening; that it must, in all cases, depend upon the circumstances.

In *Hargreaves v. Rothwell*, 1 Keen, 154, Lord Langdale, master of the rolls, held that where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there is no ground for a distinction by which the rule that notice to the solicitor is notice to the client should be restricted to the same transaction.

In *Nixon v. Hamilton*, 2 Dru. & Walsh, 364, decided in 1838, Lord Chancellor Plunket adverted to the rule as to the necessity of notice in the same transaction, and stated, if it were notice acquired in the same transaction, necessarily the principal was to be charged with the knowledge of the agent; but if it were notice received by him in another transaction, then such notice was not to affect the principal, unless he actually had the knowledge at the time of the second transaction. See also the case of *Dresser v. Norwood*, 17 Com. B., N. S., 466, decided in the court of exchequer chamber.

This modification of the old English rule is recognized in the comparatively late case of *The Distilled Spirits*, 11 Wall. 356. Mr. Justice Bradley, in delivering the opinion of the supreme court of the United States, stated that the doctrine in England seems to be established that, if the agent at the time of effecting a purchase has knowledge of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend upon facts and other circumstances. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. And the learned justice states that the rule, as finally settled by the English court, is, in his judgment, the true one, and is deduced from the best

consideration of the reasons on which it is founded. In this opinion the whole court concurred.

Story, in his work on agency, section 140, says: "But unless notice of the fact come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal. For otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice, therefore, to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

In *Bank of the United States v. Davis*, 2 Hill, 451, it was held that the principal is deemed to have notice of whatever is communicated to his agent while acting as such in a transaction to which the communication relates. And it was held in that case that notice to a bank director or knowledge obtained by him while not engaged officially in the business of the bank would be inoperative as notice to the bank.

In *Holden v. New York and Erie Bank*, 72 N. Y. 286, the rule was explained, and it was therein held that where an agency was in its nature continuous and made up of a long series of transactions of the same general character, the knowledge acquired by the agent in one or more of the transactions is to be charged as the knowledge of the principal, and will affect the principal in any other transaction in which the agent as such is engaged, and in which the knowledge is material. In that case it will be seen upon reading the very able opinion of Folger, C. J., that there was no question as to the knowledge of the agent of the various facts, and the only question raised was whether it should be imputed to his various principals in the transactions.

In *Cragie v. Hadley*, 99 N. Y. 131, the doctrine that the knowledge of the agent should come to him in the identical transaction was alluded to, and it was held that it was not necessary in all cases that the notice should be thus given, and that notice to an agent of a bank intrusted with the management of its business was notice to the corporations in transactions conducted by such agent, acting for the corporation in the scope of his authority, whether the knowledge of the agent was acquired in the course of a particular dealing or on some prior occasion. See also *Welsh v. German American Bank*, 73 N. Y. 434; *Atlantic State Bank etc. v. Savery*, 82 Id. 291.

From all these various cases it will be seen that the furthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, at another time and for another principal, was present to his mind at the very time of the transaction in question. Upon a careful review of the testimony in this case, we have been unable to find any such proof. It is true, the learned trial judge finds that, contemporaneously with the execution of the mortgage to the university, Deane caused to be made a statement, upon the basis that the amount was to be loaned to the mortgagors, and that, out of the money coming to them as a consideration for the mortgage to the university, the amount of the bond and mortgage to the plaintiff's decedent, with interest, was to be paid, and that mortgage was to be satisfied. And he further found that the university, through Deane, had notice of the mortgage of the plaintiff's decedent in connection with and as part of any proposed transaction by which there was to be loaned to the mortgagor the amount of the bond and mortgage to the university. What is meant by the word "contemporaneously," as used in this finding, is, perhaps, not absolutely clear. If it meant that the statement mentioned was procured to be made by Deane as a part of and coincident with the execution of the mortgage to the university, it is not, as we think, based upon any evidence. There is no proof whatever in this case that Deane procured this statement to be made by anybody, and Deane himself says that a statement of this nature would, by the course of practice in his office, have come to him (made by some one in his office) the day after the loan was closed. He does not pretend to recollect this particular statement, nor is there any evidence that he procured it to be made. His testimony shows that he had no special recollection of the things which took place upon the occasion of the execution of the bond and mortgage to the university further than appeared by his books and other memoranda then made by others; and he does not pretend to say that this particular statement was presented to him, or that he had the least knowledge of its existence, or of the facts therein stated, until the day after the

closing of the transaction, and the execution of the mortgage to the university.

This is every particle of evidence that there is upon which a finding could be based, such as the learned judge made of knowledge or notice on the part of Deane of the existence of the Constant mortgage at the time of the transaction with the university, and the execution of the mortgage to it. The other facts in the case uncontradicted are that, for some years prior to January, 1884, Deane and the plaintiffs' decedent were acting together, and that the plaintiffs' decedent was, weekly and even almost daily, in the habit of investing large amounts of money upon mortgages of this nature, and that the dealings of plaintiffs' decedent in these various building mortgages, through Deane's office, had amounted, at the time of the mortgage to the university, in the aggregate, to three millions of dollars, if not more; that the mortgages were of all sizes, from six up to forty thousand dollars. It also appears that this very mortgage in suit was found after the execution of the university mortgage in a pigeon-hole in which satisfied mortgages were kept, and was found by the assignee of Deane after the assignment was made.

There is no proof in the case showing that Deane made any pretense of remembering, at the time of the execution of the mortgage to the university, that eleven months before he had taken a mortgage on the same property for the plaintiffs' decedent, which was not recorded. Taking into consideration the enormous amount of business done by Deane for Constant of this same general nature, and the length of time that elapsed since the taking of the Constant mortgage by him, and the fact that it was never taken from the office by the mortgagee, and that it remained there and was found in a pigeon-hole appropriated to satisfied mortgages, and that on the very statement in question upon which the learned judge evidently based his finding it is alluded to as satisfied,—all these facts would tend to show very strongly that Deane had no recollection whatever of the existence of the Constant mortgage as an existing lien at the time he took the mortgage to the university.

But the burden is upon the plaintiff to prove, clearly and beyond question, that he did, and it is not upon the defendant to show that he did not, have such recollection. And we think that there is a total lack of evidence in the case which would sustain the finding that Deane had the least recollection on

the subject at the time of the execution of the university mortgage. Under such circumstances, we think it impossible to impute notice to the university, or knowledge in regard to a fact which is not proved to have been possessed by its agent. If such knowledge did not exist in Deane at the time of his taking the mortgage to the university, then the latter is a *bona fide* mortgagee for value, and its mortgage should be regarded as a prior lien to that of the unrecorded mortgage of Constant which is prior in point of date. The plaintiffs are bound to show by clear and satisfactory evidence that when this mortgage to the university was taken by Deane, he then had knowledge, and the fact was then present to his mind, not only that he had taken a mortgage to Constant eleven months prior thereto on the same premises, which had not been recorded, but that such mortgage was an existing and valid lien upon the premises, which had not been in any manner satisfied. If he recollected that there had been such a mortgage, but honestly believed that it was or had been satisfied, then, although mistaken upon that point, the university could not be charged with knowledge of the existence of such mortgage.

Quite a strong reason for not imputing knowledge to the agent in this case, unless upon evidence clear and satisfactory, is, that if he had such knowledge, and thus knowingly took an utterly worthless security for his principal, he acted in the most improper and dishonest manner, and willfully caused a loss to his principal of substantially the whole amount of the money represented by the mortgage which he took as a second lien. While this consideration is not controlling, if the evidence justified the assumption, it is yet of considerable weight, and adds to the propriety of the rule requiring clear proof of such knowledge at the very time of taking the mortgage to the university.

One other question has been argued before us which has been the subject of a good deal of thought. It is this: Assuming that Deane had knowledge of the existence of the Constant mortgage at the time of the execution of the mortgage to the university, is his knowledge to be imputed to the university, considering the position Deane occupied to both mortgagees?

While acting as the agent of Constant in taking the mortgage in question as security for the funds which he was investing for him, it was the duty of Deane to see that the moneys

were safely and securely invested. The value of the property was between eleven thousand and twelve thousand dollars; and it was obviously the duty of Deane to see to it that the mortgage which he took upon such property as a security for a loan of six thousand dollars for Constant should be a first lien thereon: *Whitney v. Martine*, 88 N. Y. 535. In order to become such first lien, it was the duty of Deane to see to it that the Constant mortgage was first recorded. In January, 1884, when acting as agent for the university to invest its moneys, he owed the same duty to the university that he did to Constant, and it was his business to see to it that the security which he took was a safe and secure one. Neither mortgage was safe or secure if it were a subsequent lien to the other upon this property. This duty he continued to owe to Constant at the time he took the mortgage to the university.

At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant and to the university, the duty in each case being to make the mortgage to each principal a first lien on the property. Owing these conflicting duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice? It has been stated that in such a case, where an agent thus owes conflicting duties, the security which is taken or the act which is performed by the agent may be repudiated by his principal when he becomes aware of the position occupied by such agent: *Story on Agency*, sec. 210.

The reason for this rule is, that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency; and where the agent owes conflicting duties, he cannot give that which the principal has the right to demand, and which he has impliedly contracted to give. Ought the university to be charged with notice of the existence of this prior mortgage when it was the duty of its agent to procure for it a first lien, while, at the same time, in his capacity as agent for Constant, it was equally his duty to give to him the prior lien? Which principal should he serve? There have been cases where, in the sale and purchase of the same real estate, both parties have employed the same agent, and it has been held, under such circumstances, that the knowledge of the agent was to be imputed to both of his

principals. If, with a full knowledge of the facts that his own agent was the agent of the other, each principal retained him in his employment, we can see that there would be propriety in so holding; for each, then, notes the position which the agent has with regard to the other, and each takes the risk of having imputed to him whatever knowledge the agent may have on the subject: See *Le Neve v. Le Neve*, 1 Amb. 436, Hardwicke, chancellor, decided in 1747; *Toulmin v. Steere*, 3 Mer. 209, decided in 1817, by Sir Walter Grant, master of the rolls. The case of *Nixon v. Hamilton*, already referred to, decided by Lord Plunket, lord chancellor in the Irish court of chancery, in 1838 (2 Dru. & Walsh, 364), is a case in many respects somewhat like the one at bar, so far as this principle is concerned, if it be assumed that Deane really had the knowledge of the prior mortgage as an existing lien. It will be observed, however, upon examination of it, that the question whether the knowledge of the common agent in two different transactions, with two different principals, was notice to the second principal, was not raised with reference to this particular ground. The whole discussion was upon the subject of imputing the knowledge of the agent to the second mortgagee of the existence of the prior mortgage, which knowledge was not obtained in the last transaction. Whether such knowledge should or should not be imputed to the second mortgagee, because of the conflicting duties owed by the common agent, was not raised. The only defense set up was, that the information did not come to the agent of the second mortgagee in the course of transacting the business of the second mortgagee, and the question was simply whether such knowledge could be imputed to the second mortgagee because of the knowledge acquired by his agent at another time, in another transaction with another principal. The court held that where it appeared, as in this case it did appear, fully and plainly that the matter was fresh in the recollection, and fully within the knowledge of the agent, and under such circumstances that it was a gross fraud on the part of the agent, in the first place, in keeping a prior mortgage off the record, and in the second place, in not communicating the knowledge which he had to his principal, the second mortgagee, that in such case the second mortgagee was charged with the knowledge of his agent.

Whether the same result would have been reached if the other ground had been argued, we cannot, of course, assume to

decide. I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in the case of an agent, situated as I have stated, that his principal in the second mortgage should be charged with knowledge which such agent acquired in another transaction at a different time while in the employment of a different principal, and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it, however, necessary to decide the question in this case.

For the reasons already given, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

KNOWLEDGE OF FACT ACQUIRED BY AGENT AT TIME WHEN NOT ACTING AS SUCH, if actually had in mind by him when afterwards acting for his principal, will, as respects that transaction, be imputed to the principal: *Wilson v. Minnesota etc. Ins. Co.*, 36 Minn. 112; 1 Am. St. Rep. 659.

GENERAL RULE THAT NOTICE TO AGENT IS NOTICE TO PRINCIPAL is subject to the limitation that the notice must be to the agent when acting within the scope of his agency, and must relate to the business in which he is engaged by authority of his principal: *Congar v. Chicago etc. R. R. Co.*, 24 Wis. 157; 1 Am. Rep. 164.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

OBERG v. BREEN.

[50 NEW JERSEY LAW, 145.]

EVIDENCE. — **ONE'S BOOK OF ACCOUNTS IS NOT EVIDENCE IN HIS FAVOR**
touching the receipts of money by him.

SUIT on a book of account. Judgment for defendant.

T. C. Simonton, Jr., for the plaintiffs in error.

Robert Williams, for the defendant in error.

BEASLEY, C. J. This was a suit on a book of account, which was admitted to be barred by the statute of limitations, unless the plaintiff's book of account was evidence of payments on such claim by the deceased. The last item on the debit side of the account was of the date of August 8, 1877, and the writ issued on the 28th of October, 1886. To bridge over this long period, the book contained a numerous train of credits of moneys paid. The book was proved as a book of original entries, and was offered to prove the account and the credits. It was rejected at the trial as evidence for the latter purpose.

This decision, in my opinion, was clearly right. A man's book is not testimony in his own favor touching the receipts of money by him. By immemorial usage, a person's own books have, for certain defined purposes, become legal evidence, recognized by repeated decisions of the courts of this state. They are legitimate *prima facie* evidence to show the sale and delivery, in the usual course of business, of personal property and its price, and of work and labor performed, and the sums due for such services. Thus far the rule that a man

cannot put in evidence his own written memoranda has been abrogated, the reason of such infringement of the common-law principle being that it was a necessity in the transaction of certain classes of business. It has, however, never been authoritatively declared in this state that these entries have any evidential force beyond these functions. It is true that it was said in the opinion read in the court of errors in the case of *Inslee v. Prall*, 25 N. J. L. 665, that such books, when there have been mutual dealings between the parties, are competent evidence to prove the payment of money, when such money has been paid on account of claims that might be proved by books of account, but this was an expression entirely *obiter*, for no such question was present in the record, and the contrary view was supported in the supreme court by a weight of argument which has always seemed to me to be wellnigh irresistible.

But be this as it may, it has never been judicially indicated, so far as it is remembered, that a credit given by a trader to his customer is evidence in his own favor. No reason is perceived why it should have such force. As a mere memorandum showing the state of the account and being devoid of all value as testimony in a court of justice, it answers all the purposes of the merchant keeping the books; and as to the customer, the entry is of small importance to him, as, if a man of ordinary prudence, when he pays money he does the act by a check or takes a receipt. There is no ground, therefore, for contending that entries of this character are so highly convenient in the course of trade in this department as to be a necessary concomitant to it.

The books were not admissible evidence for the purpose for which they were offered.

The foregoing conclusion makes it unnecessary to consider the alternative question discussed in the briefs of counsel.

The judgment should be affirmed.

THE QUESTION OF THE ADMISSIBILITY OF BOOKS OF ACCOUNT as evidence is considered in the note to *Union Bank v. Knapp*, 15 Am. Dec. 191-198; see also *State v. Shinborn*, 46 N. H. 497; 88 Am. Dec. 224; *Bamfield v. Whipple*, 10 Allen, 27; 87 Am. Dec. 618.

VOORHIS v. TERHUNE.

[50 NEW JERSEY LAW, 147.]

AN EXECUTION SALE MAY, ON MOTION, BE SET ASIDE, TOGETHER WITH THE LEVY ON WHICH IT IS BASED, by the court out of which the writ issued, when all the parties are before the court, and the process has been used for, and the sale under it accomplishes, fraud, injustice, or oppression.

UNDER A WRIT OF ERROR, THE COURT WILL NOT DECIDE QUESTIONS OF FACT, and will look into the evidence only to discover whether it affords, on any permissible interpretation of it, a rational support of the findings made by the trial court.

A LEVY ON STOCK IN CORPORATION AND A SALE THEREUNDER WILL BE VACATED ON MOTION, if the statute prescribing the mode of the levy is not followed, as where no notice of the levy is given to any officer of the corporation which issued the stock.

John W. Taylor, for the plaintiff in error.

John Linn, for the defendant in error.

KNAPP, J. Under this writ of error the plaintiff attacks the validity of an order made by the supreme court setting aside a sale of shares of stock in the Midland Railroad Company of New Jersey, belonging to Terhune. The sale was made by the sheriff of Essex County, under an execution issued out of the supreme court, on a judgment recovered by the plaintiff in error against the defendant in error, in the Bergen circuit court, and afterwards docketed in the supreme court.

The chief legal question involved in the case is, whether the supreme court of this state has adequate power of control over its own process of execution to annul and set aside a sale made by the law officer having the writ to execute, when such process has been used for, and the sale under it accomplishes, fraud, injustice, or oppression, and when all the parties are before the court.

This power is denied by the plaintiffs in error, who contend that remedy can be had only by resort to a court of equity.

That courts of equity have jurisdiction to determine the validity of sales made by sheriffs and other law officers in the execution of final process of the law courts, is undoubtedly true. That the exercise of such a power in the law court is of an equitable nature, may be fully conceded. But this is no new thing, for the determination of questions frequently adjudged in the law courts rests upon equitable principles, and upon the exercise of equitable powers.

There are cases which, in the adjustment of all the rights

of interested parties, are beyond the grasp of courts of law, and the broader range of equity jurisdiction is by the circumstances required to administer complete justice. But where the parties in interest are all before the court whose process has been irregularly used or abused, and full justice can be done by the methods and practice of such court, it would be admitting a fatal weakness in the constitution of such court to concede that it is powerless to do what indisputable justice may demand to be done. Such power would seem to be necessarily inherent in a court of as broad jurisdiction as that of our supreme court, and strong reasons should be found to bar the way to its exercise in proper cases, while in truth no valid reason is, or, as I think, can be, urged against it.

It is true, generally, that in sales under execution the duties of the officer executing the writ are directed by statute, and title passes to a purchaser without further confirmation by the court out of which the process issued, but it may be asserted that according to the prevalent practice of the courts in the American states the negative power of setting aside such sales for cause is claimed and exercised.

In Rorer on Judicial Sales, as the result of a quite full examination of the cases, the rule is stated to be that the court upon whose judgment execution issues has full power to set aside an execution sale whenever the ends of justice and fair dealing require it, and to order a resale, or award a new execution at discretion. The following language of the court, in *McLean County Bank v. Flagg*, 31 Ill. 290, is noted as a correct statement of the general rule:—

“The power over its own process is possessed by all courts. Such power is a species of equitable jurisdiction that is inherent in courts of law as well as courts of equity. This court has repeatedly held, as between a purchaser and the original parties to the suit, that a court of law will not hesitate to exercise the power of setting a sale aside on account of fraud or irregularity”: Rorer on Judicial Sales, sec. 1081.

In Herman on Executions the cases are fully collected in support of the power of the court to set aside sales made on its own process. The writer says: “It is the duty of all courts, when satisfied that sales made under their process is affected with fraud, irregularity, or error, willful disregard of the statutory regulations by the officer, whereby the rights of either of the parties interested are seriously affected, to set aside such sale upon a proper showing to the court under whose process

the sale was made, and order a resale of the property": *Herman on Executions*, p. 406, sec. 249, and cases.

Freeman on Executions fully recognizes this authority in all courts.

In this case all the parties were before the court below, and the action of the court was the exercise of no unusual or doubtful power. It had jurisdiction, not only to set aside the levy, but to order a rescission of the sale made by the sheriff, if sufficient ground was laid before it to call for such action.

Was there legal ground for the judgment of the court below? This depends upon its finding of fact upon evidence.

This is a writ of error, and its sole office is to present legal questions for decision. Under it the court will not decide questions of fact, and will look into the evidence only to discover whether it affords, on any permissible interpretation of it, a rational support for such finding. If it be found to be of this degree of strength, the determination of fact must be accepted as conclusive: *Harrison v. Allen*, 40 N. J. L. 556; *Johnson v. Arnwine*, 42 Id. 451, and cases cited.

In *Johnson v. Arnwine*, *supra*, one among the errors assigned was, that the proof of loss of a paper was insufficient to let in secondary evidence of its contents. This being a preliminary question to be solved by the court upon the evidence, Justice Depue says: "If the decision of the judge upon the testimony offered on that subject is liable to review on writs of error, the *onus* is on the plaintiff in error of showing that the result reached was erroneous, and there should be no reversal, unless it clearly appears that the court below was in error, and that injustice was done by the erroneous decision." This branch of the case exemplifies in one of its phases the rule of this court that it reverses only for errors in law injurious to the party assigning them.

That the testimony taken under the rule in the court below was legally sufficient to support a state of facts, such as justified the court in its determination, admits of no serious doubt.

The levy made by the sheriff was, as to this species of property, of too doubtful a character, under our statute, to demand that it be sustained.

Shares in corporations were not in this state the subject of sale under execution before the passage of the act of March 9, 1842, entitled "An act to abolish imprisonment for debt." The fifth section provided that any share or interest in any joint-

stock company incorporated in this state, belonging to a defendant in execution, may be taken and sold by virtue of such execution, in the same manner as goods and chattels. The sixth section required the clerk, cashier, or other officer of the company having custody of its books, to certify to the sheriff, on his presenting the execution, the number of shares or amount of interest held by the defendant in the company.

In the Revision of 1846 these sections passed into the act respecting execution, as the seventh and eighth sections of that act.

It was held under this legislation that the delivery of execution to the sheriff did not bind this kind of property; that a levy made by the sheriff by mere inventory without applying to the company, whose shares the defendant held, was not sufficient to defeat the rights of one purchasing such shares of the defendant. It was also strongly urged that actual notice to the defendant, if within the sheriff's jurisdiction, that his stock was levied upon, was required by considerations of public policy and commercial convenience. And this where the office of the corporation was within the sheriff's bailiwick: *Princeton Bank v. Crozer*, 22 N. J. L. 383.

The law prescribing the present mode of levy upon such property is embodied in the fourth, fifth, sixth, and seventh sections of the act relating to executions: Revision, p. 390.

The earlier provisions referred to are retained substantially as first enacted, and in addition a mode is prescribed in the sixth section for effecting a levy where the custodian of the books, being the clerk, cashier, or other officer of the company, is not resident in the state. In such case, the notice and requirement of certificate of the defendant's interest may be mailed to such officer of the company having the books. In addition to notice by mail, it is made the duty of such sheriff, "on the day of mailing such notice, to affix and set up, upon any office or place of business of such company within his county, a like notice in writing, and upon the same day to serve like notice in writing upon the president and directors of said company, or upon such of them as reside in his county, either personally, or by leaving the same at their respective places of abode; and the sending, setting up, and serving of such notices, in the manner aforesaid, shall constitute such levy taken a valid levy of such writ upon all shares of stock in such company held by the defendant in execution."

The mode thus prescribed for effecting a levy on stock was

designed to and can scarcely fail of bringing notice to a defendant of the fact of levy, without direct communication with him. Notice directly to the defendant is not required to be given by the present law, nor was it by the act of 1842.

In the seizure and sale of this species of right, notice in some form to the defendant would seem indispensable to avoid loss or fraud, and in the majority of instances a faithful pursuit of the statutory mode must inform him in time to protect himself. The statutes contemplate full publicity.

All that was done in this case, in the attempt to make a levy, was notice sent to the secretary of the New York, Susquehanna, and Western Railroad Company. He was not an officer of the Midland company, in which the defendant held the stock which was intended to be taken under execution, and the inference is fairly to be drawn from the testimony, that the officer applied to was more likely to conceal from the defendant the proceeding than to inform him of it.

As to the sale, I deem it to be established in the case that the process of execution was misused to the detriment of the defendant. It was not illegal to issue execution to the sheriff of Essex, but there was nothing that legitimately called for that course. The defendant had no property there. The shares of stock were insignificant in value, and if the design was simply to reach them towards satisfaction of judgment, they were as well within the reach of the sheriff of Bergen County, where all the parties resided, and where the defendant would have been quite certain of notice. But the court below were justified in concluding satisfaction of the debt was not the motive that caused this writ to be issued. The defendant and the New York, Susquehanna, and Western Railroad Company were opposing litigants, and the ownership of this stock gave the defendant an advantage in the litigation which the loss of the stock would deprive him of. The evidence justified the belief that the plaintiffs permitted their process to be used by or in behalf of that company to get this stock from the defendant without his knowledge, and to put him at a disadvantage in their contest.

It was a use of the writ wholly foreign to its design. It was granted to the plaintiffs for just and legitimate purposes. Its control and use was placed at the disposal of a stranger in interest to the suit, whereby indirect, unjust, and oppressive ends might be effected against the defendant.

This was ground for setting aside the sale, and the order of the court below should be affirmed, with costs.

THE VACATION OF EXECUTION SALES is a familiar proceeding; and is accomplished sometimes by an independent suit in equity, but more frequently by a motion to the court out of which the writ issued. In some states, the remedies are concurrent, or nearly so. In others, the remedy in equity cannot be successfully pursued while an adequate remedy still exists in the original action: *Wilson v. Miller*, 30 Md. 82; 96 Am. Dec. 568. "As a general rule, the aid of equity cannot be invoked by any person having a speedy and adequate remedy at law. No doubt an execution sale may be vacated by motion made to the court, and in the case whence the writ issued. This remedy is always more speedy, and is usually as adequate as any which can be pursued by an independent proceeding in equity. Where a sale is sought to be vacated for any irregularity in the writ, or in the proceedings of the officer in executing the writ, application ought to be made to the court issuing the writ, and if made elsewhere, ought not to be entertained. The same rule prevails in chancery. 'If the master sells at an improper time, or in such a manner as to prevent a fair competition, or if for any other cause it would be inequitable to permit the sale to stand, the proper remedy is by a summary application to the court, in the suit in which the decree was made, for a resale of the premises upon such terms and conditions as may be just, so as to protect the rights of the purchaser as well as the rights of the parties interested in the sale. And it would seriously affect the interests of those whose property is sold by masters under decrees of this court, if it was understood that questions of this kind were to be litigated and determined in a collateral suit. For no man of ordinary prudence would bid what he believed to be the fair cash value of the property at a master's sale, if he would be subjected to the expense and delay of a protracted chancery suit to determine whether the proceedings of the master had been strictly regular.' The jurisdiction of courts of equity has always been considered as specially adapted to the investigation of fraudulent devices of every character, and to extending appropriate relief when the existence of those devices has been discovered. So, too, it has long been sought for the purpose of obtaining redress in cases of accident, surprise, or mistake. These courts have not, however, exclusive control over cases of fraud or accident. Their jurisdiction is often concurrent with that of courts of law. Hence where grounds exist for vacating a sale, which rest not in irregularity of proceeding, but in fraudulent devices practiced upon the complainant, or in accident or mistake for which he has suffered, and from which he is entitled to relief, he may, before conveyance is made to the purchaser, proceed either by motion in the original case, or by bill in equity; but he will generally find that the latter ought to be preferred. If a conveyance has been executed, and the purchaser thereby vested with the legal title, it is doubtful whether he can be divested of it by motion. If the charge is that the sale ought to be vacated for matters not apparent from an inspection of the proceedings, such as combination to depress the bidding, or any other species of fraud, or for any misconduct on the part of the officer conducting the sale, the better opinion is, that the purchaser's title cannot be divested otherwise than by an independent suit in equity against him": *Freeman on Executions*, 2d ed., sec. 310. The grounds for vacating execution sales, and the procedure best adapted to accomplish the object, are considered in chapter 21 of the same

book. A levy, sale, and satisfaction of judgment will all be vacated on motion, if the description of the lands sold is such that they cannot be located: *Hughes v. Streeter*, 24 Ill. 647; 76 Am. Dec. 777.

VACATING LEVIES MADE UNDER EXECUTION: See Freeman on Executions, sec. 271.

IT IS NOT THE BUSINESS OF AN APPELLATE COURT to decide questions of fact, but a review of the evidence is proper when incidentally necessary to the determination of some question of law: *Cothran v. Ellie*, 125 Ill. 497. If there was not wanting evidence tending to support the finding of the trial court, the appellate court will not interfere on the ground that such finding was not supported by sufficient evidence: *Moses v. Penquit*, 72 Iowa, 611; *Johnson v. Johnson*, 125 Ill. 511; and unless the contrary is made to appear affirmatively, the court, on appeal, is bound to presume there was evidence sufficient to authorize the verdict of the jury: *Woods v. Courtney*, 16 Or. 121; and see *Driscoll v. Troughton*, 22 Neb. 260; *Cowger v. Land*, 112 Ind. 263; *St. Louis etc. R. R. Co. v. White*, 48 Ark. 495; *Pemberton v. Johnson*, 113 Ind. 538; *Sloteman v. Thomas Mfg. Co.*, 69 Wis. 499; *Schrubbe v. Connell*, 69 Id. 476; *State v. Blanchard*, 74 Iowa, 628; *Thompson v. Maxwell*, 74 Id. 415.

MURRAY v. ALBERTSON.

[50 NEW JERSEY LAW, 167.]

ON LEASE OF HOUSE OR LAND, THERE IS NO IMPLIED COVENANT THAT THE PREMISES SHALL BE FIT OR SUITABLE for the use for which the lessee requires them, whether for habitation, occupation, or cultivation.

LESSEE OF A FURNISHED HOUSE IS NOT JUSTIFIED IN ABANDONING THE PREMISES, OR REFUSING TO PAY RENT THEREFOR, by the fact that they were known to be intended for his occupation, and were in a damp and unhealthy condition, and unfit for such occupancy, there having been no misrepresentation or concealment of the state of the premises, nor any act or default of the lessor subsequent to the leasing, creating, or increasing their unfitness for occupancy.

Frederick Parker, for the plaintiff in error.

R. T. and W. B. Stout, for the defendant in error.

DEPUE, J. This suit is an action upon a covenant for the payment of rent. The lease is dated June 1, 1886. The premises demised were a house, with the furniture therein, situate at Spring Lake, a seaside resort. The letting was for the term of five months, beginning June 1st, and for the rent of \$325, payable in advance.

The defendant took possession June 3, 1886, and after ten days' occupation quit possession, giving notice thereof in writing. He justified the abandonment of the premises, and made defense against the recovery of the rent, on the ground that the cellar was in a damp and unhealthy condition by

reason of water that was in it. The water was admitted into the cellar through a hole in the cement on the cellar floor, which had been made by a former tenant chopping wood.

The agreement for the lease was made by the defendant with one Potter, the agent of the plaintiff. There was no proof that either the plaintiff or his agent had knowledge of the condition of the cellar when the lease was made. Before the lease was signed, the defendant inspected the house, but did not examine the cellar, although he might have examined it if he had chosen. There is no pretense that there was a false representation or fraudulent concealment with respect to the condition of the cellar. The only ground on which the defense can be maintained is, that on the letting of a furnished house there is a condition implied that the premises shall be reasonably fit for habitation.

The trial judge overruled the defense, and directed a verdict for the plaintiff.

The general doctrine of the law is, that on the demise of a house or lands there is no contract or condition implied that the premises shall be fit and suitable for the use for which the lessee requires them, whether for habitation, occupation, or cultivation, and consequently their unfitness for such a purpose will not justify the tenant in abandoning the premises, and on such grounds making defense to an action for rent: *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Id. 68; *Manchester Bonded Warehouse v. Carr*, L. R. 5 C. P. D. 507, 510; *Foster v. Peyser*, 9 Cush. 242; *Naumberg v. Young*, 44 N. J. L. 331, 344; 1 Addison on Contracts, 8th ed., 228.

In all cases where a tenant has been allowed upon suggestions of this kind to withdraw from the tenancy and refuse the payment of rent, there will be found to have been a fraudulent misrepresentation or concealment as to the state of the premises which were the subject of the letting, or else the premises proved to be uninhabitable by some wrongful act or default of the landlord himself: 1 Taylor's Landlord and Tenant, sec. 382. The contention is, that where the premises let are a furnished house, there is an exception to the general rule. *Smith v. Marrable*, 11 Mees. & W. 5, and *Wilson v. Finch*, L. R. 2 Ex. D. 336, are relied upon in support of this contention.

Smith v. Marrable, *supra*, was an action for the use and occupation of a furnished house. At the trial, it appeared that when the tenant took possession, the beds in the house were

infested with bugs. He quit the premises, and sent the key to the plaintiffs. Lord Abinger admitted the defense, and the defendant had a verdict. On motion for a new trial in the court of exchequer, the verdict was sustained. Baron Parke, in delivering the opinion of the court, stated the question to be, whether, in point of law, a person who lets a house must be taken to let it in a state fit for decent and comfortable habitation, and whether the tenant is at liberty to throw it up when he makes the discovery that it is not so; and on the authority of two *nisi prius* cases,—*Edwards v. Etherington*, Ryan & M. 268, and *Collins v. Barrow*, 1 Moody & R. 112,—held that where the demised premises are encumbered with a nuisance of so serious a nature that a person could not reasonably be expected to live in them, the tenant is at liberty to abandon them. The learned judge put his conclusion, not on the ground of a contract on the part of the landlord that the premises were free from a nuisance: he expressly disclaimed the idea that there was such a contract, and rested his opinion upon the implied condition of law that there was an undertaking to let them in a habitable condition.

Smith v. Marrable, *supra*, was decided in January, 1843. In November of the same year the question was again in the same court in *Sutton v. Temple*, 12 Mees. & W. 52. The demise was of the use of certain pasture land, and the eatage of grass thereon growing. The tenant took possession, and put his cattle on the premises. In consequence of the spread of manure in the preceding spring, in which there was a quantity of refuse paint, particles of the paint had been deposited among the grass, from the effects of which some of the tenant's cattle died. He refused to stock the pasture any longer, and gave the landlord notice. In an action for the rent, the defendant contended that he was not liable, inasmuch as the eatage was wholly unfit for the purpose for which it was taken,—the food of beasts. The defense was overruled. *Smith v. Marrable*, *supra*, was distinguished. Lord Abinger, C. B., speaking of that case, said that it was "the case of a contract of a mixed nature,—for the letting of a house and furniture at Brighton; and every one knows that the furniture upon such occasions forms the greater part of the value which the party renting it gives for the house and its contents. In such a case, the contract is for a house and furniture fit for immediate occupation; and can there be any doubt that if a party lets a house, and the goods and chattels, or the furniture

it contains, to another, that must be such furniture as is fit for the use of the party who is to occupy the house?" The chief baron then cited the instances of warranties of fitness or quality implied on the hiring of goods and chattels, and in the sale of medicines to be administered to a patient. He concluded that, "on the same principle, if a party contract for the lease of a house ready furnished, it is to be furnished in a proper manner, and so as to be fit for immediate occupation. . . . The letting of the goods and chattels, as well as the house, implies that the party who lets it so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house according to its particular description, and suitable in every respect for his use. . . . I regard that case [*Smith v. Marrable*] as being the case of a mixed contract for the letting of goods and chattels, involved with the letting of a house, and in which the goods and chattels so supplied are intended for a specific purpose." Baron Parke, in his opinion, adopted the distinction made by the chief baron between *Smith v. Marrable, supra*, and the case in hand, and likened the former to the case of a ready-furnished room in a hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation. He added that "in such a case, the bargain is not so much for the house as the furniture, and it is well understood that the house is to be supplied with fit and proper furniture, and that if it be defective, the landlord is bound to replace it." Gurney and Rolfe, barons, expressed doubts whether this distinction could be sustained, and the latter declared his preference to overrule *Smith v. Marrable, supra*, rather than to follow it in the present case.

In February, 1844, *Smith v. Marrable, supra*, was again under discussion in the court of exchequer, in *Hart v. Windsor*, 12 Mees. & W. 68. That was an action for rent upon a lease under seal. The premises demised were "a messuage or tenement, or garden ground." In fact, the messuage demised was an unfurnished dwelling-house which the defendant leased for the purpose of habitation. The plea, which was fully proved, was, that the said messuage or tenement was not in a proper state for habitation or dwelling therein; that the same was, at the time of the demise, in that state and condition that the defendant could not reasonably inhabit or dwell therein, and so continued, etc., by reason of the same being

greatly infested, swarmed, and overrun with bugs, by reason whereof the defendant quitted the premises, and gave notice, etc. The defendant on this plea had a verdict, but the court in bank ordered judgment for the plaintiff *non obstante verdicto*, on the ground that the facts stated in the plea were no defense to the action. The opinion of the court was delivered by Baron Parke, and of course brought under consideration his judgment in *Smith v. Marrable, supra*. On this subject the learned judge declared that the decision in that case could not be supported on the ground on which he had rested his judgment. He said that it was not necessary to decide in the case in hand whether *Smith v. Marrable, supra*, be law or not; that it was distinguishable from the present case on the ground it was put by Lord Abinger in *Sutton v. Temple, supra*. But he declared it to be the unanimous opinion of the court that there is no contract, still less a condition, implied by law on the demise of real property, only that it is fit for the purpose for which it is let. He added that "the principles of the common law do not warrant such a position; and though in the case of a dwelling-house taken for habitation there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes,—for building upon or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties, in every case, to protect their interests themselves by proper stipulations; and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

Mr. Addison, commenting on *Smith v. Marrable, supra*, says that contracts for the letting and hiring of ready-furnished houses and apartments are contracts of a mixed nature, partaking partly of the nature of a demise of realty, and partly of a contract for the letting and hiring of movable chattels, and that the lessor is therefore, in contracts of this description, clothed with the duties and responsibilities resulting from contracts for the letting and hiring of chattels as well as those flowing from demises of realty simply: 1 Addison on Contracts, 8th ed., 293. If the dual nature of the duties of the lessor under such a letting be conceded, it is clear that upon principle the liability of the lessor in the transaction must be restricted to breaches in respect to such of the property let whereof the law implies the warranty. On a sale of chattels in possession, a warranty of title is implied. On a sale of

realty, the law raises no such undertaking. If the transaction be a sale of realty and personalty combined, and for a gross sum, if title to the personalty should fail, the party might rescind the sale on the ground that the contract of purchase was entire. But it is inconceivable that by the association of personal property with realty, a warranty would be implied for title to the realty, which the law never implies with respect to property of that description. Suppose a lease of a farm, with the implements of husbandry upon it, or of a factory with the tools and implements used in it, it could not rationally be contended that because, on the letting of chattels, a warranty of fitness was implied, there would therefore arise a warranty that the farm was reasonably fit for cultivation, or the factory suitable for the uses for which it was demised.

The ground on which *Smith v. Marrable, supra*, was sustained by Lord Abinger in *Sutton v. Temple, supra*, — the contract implied that the furniture let with the house shall be fit for the use and occupation of such a house, and suitable in every respect for use, — makes the decision inapplicable to the present case. The defect complained of in this instance was not in the furniture, but in the condition of the house itself.

Wilson v. Finch, L. R. 2 Ex. D. 336, is more directly in point with the circumstances of this case. The demise was of a furnished house in town, from May 7 to July 31, 1875. When the tenant was about to take possession, it was discovered that the drains and cesspools were out of repair, from which noxious odors were emitted into the house. The tenant refused to occupy, and made the condition of the premises a defense to an action for rent. The court of exchequer sustained the defense. There was evidence in the case that, pending the negotiations for the lease, the tenant wrote to the landlord's agent making inquiries as to the state of the drains, and that the agent replied that the landlord believed the drainage to be in perfect order. This circumstance was adverted to in the opinions of Kelly, C. B., and Pollock, B.; and Pollock, B., seemed inclined to rest his judgment on the ground that the defect was latent, and that the tenant might be held to have relied with reason on the assurance of the lessor as to the condition of the house. But all the judges placed the judgment actually given on the ground that, where the letting was of a furnished house, the law implied that the house should, in every respect, be fit for habitation.

The judgment in *Wilson v. Finch, supra*, has no support from

Smith v. Marrable, supra, as explained by Lord Abinger in *Sutton v. Temple, supra*. Its value as a precedent in exposition of the common law will depend upon the reasoning on which the judgment was rested. Chief Baron Kelly placed his judgment on the ground that both parties contemplated that the house should be ready for the tenant's occupation; that both parties intended that the house should be fit for occupation; that is, that it should be reasonably healthy, and not dangerous to the lives of those inhabiting it. Baron Pollock assigned as the ground of his judgment that the lessor had not supplied to the tenant that which both parties intended he should supply. Lord Justice Bramhall, in a more recent case, commenting on the opinion of Chief Baron Kelly, remarked that even if both parties had contemplated that which was imputed to them, it did not follow that they so "agreed": *Robertson v. Amazon Tug Co.*, L. R. 7 Q. B. Div. 598, 604. Indeed, this reasoning would raise an implied contract of that character on every letting where the parties acted in good faith. In *Sutton v. Temple, supra*, the lessee expected to have the eatage of the grass he bargained for; and in *Hart v. Windsor, supra*, the tenant expected to have the use of the house he rented for comfortable occupation as a dwelling. In each case, the lessor was aware of such expectation, and contemplated that it should be realized. And yet the court refused to create out of these expectations and the contemplations of the parties a contract by the lessor that the premises should be fit for such use or occupation. In *Hart v. Windsor, supra*, Baron Parke held that the same rule must apply to dwelling-houses taken for habitation as to land taken for other purposes. In this respect, there is no distinction between the letting of a farm stocked with cattle for dairy purposes, or supplied with the implements of husbandry for cultivation, and the letting of a dwelling-house furnished for habitation. The principles of the common law which do not warrant the implication of a contract for the fitness of the land or tenement demised from the act of letting apply with equal force in both instances.

The defense was properly overruled, and the judgment should be affirmed.

LANDLORD LIMITING THE USE OF A BUILDING TO A SPECIFIED PURPOSE thereby recommends the building to be suitable for such purposes in its then condition: *Young v. Collett*, 63 Mich. 331.

LIABILITY OF LANDLORD FOR DEFECTS IN PREMISES, and of tenant above for a negligent use of the premises: *Brunswick etc. Co. v. Rees*, 69 Wis. 442.

BROWN v. DE GROFF.

[50 NEW JERSEY LAW, 409.]

RIGHT TO TAKE SHELL-FISH FROM NATURAL BEDS IN TIDE-WATERS of this state is a part of the public right of fishery common to all the citizens of the state, which may be exercised by them at will, except so far as it is restrained by positive law, or by grants from the state to individuals. And they cannot be deprived of this right by the unauthorized attempt of a person to appropriate the bed of the waters to his own private use.

PRIVATE CITIZEN CAN ONLY ABATE PUBLIC NUISANCE WHEN IT BECOMES OBSTRUCTION to the exercise of his private right. But when, by interfering with and causing a deprivation of the enjoyment of his private right, it becomes as to him a private nuisance, he may abate it.

CITIZEN WHO, IN TAKING CLAMS FROM NATURAL BEDS, INJURES OYSTERS planted thereon without authority, is not liable to the owner of the oysters for such injury, provided he acts with reasonable care, and does no unnecessary damage to the oysters.

ACTION of tort. The opinion states the case.

McDermott and Throckmorton, and W. T. Hoffman, for the plaintiffs in error.

E. W. Arrowsmith and R. V. Lindabury, for the defendant in error.

VAN SYCKEL, J. De Groff, the defendant in error, who was plaintiff below, before the alleged tort was committed, had planted oysters in Raritan Bay, beyond low-water mark. The evidence shows that the grounds upon which these oysters were planted were natural clam-beds. In April, 1886, the plaintiffs in error, in pursuit of their occupation, went upon these grounds to fish for clams, and in doing so, brought up with their rakes some of the planted oysters. The oysters were not appropriated by the fishermen to their own use, but were returned by them to the water, and were subsequently found to be dead. This suit was brought for the disturbance of and injury to the oysters, and judgment was recovered for damages by the plaintiff in the court below. The fishermen insisted that the plaintiff's oysters were planted on natural clamming-ground; that the presence of the oysters on such ground did not deprive them of their right to take clams there; and that if, in taking clams, they did no unnecessary and avoidable injury to the oysters, they could not be held liable for the injury done to De Groff.

The trial court rejected this view of the law, and instructed the jury, in substance, that even if the plaintiff's oysters were

upon natural clamming-grounds, so as to amount to a public nuisance, still the defendants had no right to interfere with or injure them, for the reason that a private person had no right to abate a nuisance which is purely public.

The error assigned challenges the correctness of this charge.

The right to take shell-fish below high-water mark, from natural beds in the tide-waters of this state, is a part of the public right of fishery, which has been fully recognized, and cannot now be controverted.

It is a right common to all the citizens of the state, which may be exercised by them at will, except so far as it is restrained by positive law, or by grants from the state to individuals.

In *Paul v. Hazleton*, 37 N. J. L. 106, and *Wooley v. Campbell*, 37 Id. 163, the cases upon which the doctrine rests are cited and discussed.

The defendants below had an undoubted right to go upon these natural beds to take clams, and could not be deprived of that right by the unauthorized attempt of De Groff to appropriate the bed of the waters to his own private use. The planting of these oysters constituted a public nuisance, and unless it could be abated by the defendants so far as was necessary to enable them to enjoy their right of fishing, that right will be subordinated to and swept away by a claim which has its foundation in a trespass upon the public domain.

Loose expressions have crept into some of the decisions upon the subject of abating nuisances, to the effect that a public nuisance may be abated by any one.

No authority for so broad a statement can be found in the law of England or of this country. No one has a right to abate a purely public nuisance.

Where the common law prevails, I think search will be made in vain for a well-considered case which would justify a private person in abating a disorderly house, or a gaming-house, or a house where liquor is habitually sold contrary to law. The cases on this subject are collected in the twenty-first chapter of Wood on Nuisances. The individual citizen may not lawfully abate every public nuisance; his right to abate arises only when the nuisance becomes an obstruction to the exercise of his private right. It makes no difference that the right is one which all other citizens may enjoy in common with himself, otherwise the traveler on the public

highway could not remove the barrier which hindered his further progress.

The rule is well stated by Chief Justice Shaw, in *Brown v. Perkins*, 12 Gray, 100: "The true theory of abatement of nuisances is, that an individual citizen may abate a private nuisance injurious to him when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right; and he cannot be called in question for so doing." This case was cited and approved in *Miller v. Forman*, 37 N. J. L. 55.

Mayor of Colchester v. Brooke, 7 Q. B. 339, is relied upon to support the judgment below. In that case, the plaintiff's oyster-bed was injured by the negligence of the defendant in navigating his vessel over it, and upon that ground the right to maintain the action is rested. If there had been an absence of negligence, the defendant's right to pass over the waters of the river with his vessel would have presented a complete defense to the action. If a carriage is left in a highway, so as to constitute a public nuisance, an injury unnecessarily done to it by the carelessness of one in driving along the public way would be actionable; but if the injury is unavoidably done in the reasonable use of the right of passage, there could be no recovery.

The cases of *Dimes v. Petley*, 15 Q. B. 276, and *Bateman v. Bluck*, 18 Id. 870, go only to the extent of maintaining what I conceive to be the law, that a private individual may not lawfully abate a public nuisance, with no purpose or object other than to have it removed. It is in this view of the law that the supreme court of New York, in *Harrower v. Ritson*, 37 Barb. 301, and in *Griffith v. McCullum*, 46 Id. 561, held that every encroachment by fencing upon a public road is not a public nuisance *per se*, so as to authorize an individual to abate it, unless it interferes with the use of the road by the public; that the justification of one removing the fence will be limited by the necessity of the case, and if the use of the road is not interfered with by the fence, he will be a trespasser in removing it. Whether the rule is too broadly stated in these cases it is not necessary to determine.

If, in the case under review, the plaintiffs in error had gone upon the bay merely to abate the public nuisance created by the planted oysters, and not to exercise their legal right of taking clams, the English cases which have been cited would be applicable in denial of their immunity from liability. The

private citizen may not, in such case, volunteer, in behalf of the public, to remove that which is an invasion of the public right, and thus summarily punish the offender.

It is not until the public nuisance becomes, as to him, a private one, by interfering with and causing a deprivation of the enjoyment of his private rights, that he can put it aside without appealing for relief to the legal tribunals.

When the injury thus becomes a private one, he may abate it, and need not wait for the slower process of removal by an appeal to the law.

It was competent, therefore, for the defendants below to show in their defense, as a complete justification, that they went upon the clam-beds in good faith, for the purpose of taking clams, and that in the exercise of that privilege they acted with reasonable care, and did no unnecessary damage to the plaintiff's property. They had a right to go upon all parts of the natural clam-beds, and remove the clams there found, and in that right they could not be restricted by the unlawful act of the plaintiff. The argument of the plaintiff below is, that every one has a right to travel on every part of the public road, but that one cannot, for that reason, drive against a carriage which is left as a nuisance in the highway, if he can, with reasonable care, by using another part of the roadway, avoid it, and that applying this rule, the fishermen were under a duty to take clams on the part of the natural beds not covered by the planted oysters.

The cases would be parallel if the fishermen had unnecessarily done the injury in merely traveling over the waterway.

If the traveler in the public highway found it necessary, in the pursuit of property which he might lawfully take and remove, to drive where the carriage was unlawfully left, he would not be responsible for damage unavoidably done.

If it could be shown to the satisfaction of the jury that the fishermen, under mere pretense of pursuing their vocation, had availed themselves of the opportunity to destroy the plaintiff's property, the law would charge them with a willful trespass, and compel them to make restitution.

Clark v. Ice Company, 24 Mich. 509, and *State v. Keeran*, 5 R. I. 510, fully recognize the doctrine that all willful or unnecessary injury to wrong-doers or to their property is itself a wrong, and that no man can set up a public or a private wrong

committed by another as an excuse for an unnecessary injury to him or his property.

The judgment below should be reversed.

FISHERY. — **RIGHT OF PUBLIC IN UNINCLOSED FLATS** between high and low water mark of the sea: *Packard v. Ryder*, 144 Mass. 440; 59 Am. Rep. 401; in great lakes, remote from land, all are permitted to fish: *Lincoln v. Davis*, 53 Mich. 375; 51 Am. Rep. 116. Right of fishery is common to all in navigable rivers and arms of the sea: *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386; *Carson v. Blazer*, 2 Binn. 475; 4 Am. Dec. 463; *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89; *Rogers v. Jones*, 1 Wend. 237; 19 Am. Dec. 493; *Cobb v. Davenport*, 33 N. J. L. 223; 97 Am. Dec. 718; notes to 42 Am. Dec. 160, and 54 Id. 769; but right of fishery in non-navigable streams is in the owners of the adjacent soil, to the exclusion of the public: *Waters v. Lilley*, 4 Pick. 145; 16 Am. Dec. 333; *Commonwealth v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386; *Hooker v. Cummings*, 20 Johns. 290; 11 Am. Dec. 249; *Porter v. Foster*, 20 Me. 391; 37 Am. Dec. 59; and note to *Tinicum Fishing Co. v. Carter*, 100 Id. 608.

PRIVATE ACTION WILL LIE IN THE CASE OF A PUBLIC NUISANCE in favor of one who suffers special damage thereby: *Burrows v. Pizley*, 1 Root, 362; 1 Am. Dec. 56; *Gates v. Blincoe*, 2 Dana, 158; 26 Am. Dec. 440, note 443-445; *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89; *Low v. Knowlton*, 26 Me. 128; 45 Am. Dec. 100; *Cole v. Sprowl*, 35 Me. 161; 56 Am. Dec. 696; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123; *Brown v. Watson*, 47 Me. 161; 74 Am. Dec. 482; note to *Bigelow v. Hartford Bridge Co.*, 36 Id. 510.

CITY RAILWAY COMPANY v. LEE.

[50 NEW JERSEY LAW, 435.]

QUESTION OF CONTRIBUTORY NEGLIGENCE IS TO BE DETERMINED BY JURY, and not by the court, when the testimony leaves the question in doubt.

IT IS NOT CONTRIBUTORY NEGLIGENCE FOR PASSENGER TO EXPOSE HIMSELF, at the invitation of a carrier, to risk of danger created by the carrier, which the passenger did not know, and of which no warning was given to him. Thus in this case, the plaintiff was invited by the defendant to take passage on one of its cars at a time when the only place left for him to take was on the foot-board running along the outside of the car, which was an open one. At the place where he got on the car the track was single, and he did not know that it was different elsewhere. On another part of the line there was a double track, and the space between the tracks was not sufficient to allow two cars going in different directions, each carrying passengers on the foot-boards, to pass with safety to such passengers. At this part of the line the plaintiff was knocked off his car, and injured by colliding with a passenger standing on the foot-board of a similar car of the company passing in an opposite direction on the other track. It was held that, if the question of contributory negligence was raised by the case, it was one for the jury, and there was no error in refusing to nonsuit and submitting that question to them.

ACTION to recover damages for personal injuries. The opinion states the case.

H. N. Barton and B. Gummere, for the plaintiff in error.

Carroll Robbins and James Buchanan, for the defendant in error.

KNAPP, J. The bill of exceptions sealed and sent with the record in this case presents the question whether the trial court erred in law in refusing to nonsuit the plaintiff at the close of his case, in response to the request of the defendant. The suit was for negligent injury to the plaintiff below, the defendant here, received by the defendant while a passenger on a car of the plaintiff being transported over its line. It is not contended seriously that at the close of the defendant's case there was no evidence to go to the jury in support of the averred negligence of the company. The ground relied upon in the defendant's defeat was that he by his own carelessness materially contributed to his own injury, and that this appeared in the evidence in his own behalf. There is no doubt as to the legal rule that negligence on the part of a plaintiff, such as contributes to the injury of which he complains, when discovered through his own testimony, will preclude his right of recovery: *Cent. R. R. Co. v. Moore*, 24 N. J. L. 268, 824; *Runyon v. Cent. R. R. Co.*, 25 Id. 556; *Drake v. Mount*, 33 Id. 441; *Penn. R. R. Co. v. Matthews*, 36 Id. 531; *Delaware, L., & W. R. R. Co. v. Toffey*, 38 Id. 525.

And it is also settled that a refusal of the court to nonsuit on request where such ground exists for the motion is legal error: *Orange & N. H. R. R. Co. v. Ward*, 47 N. J. L. 560.

Whether, then, the court was wrong in its refusal to nonsuit must depend upon the existence in the testimony of such proof of fault and imprudence on the part of defendant, exposing him to injury, as in the eye of the law is culpable. If the testimony left that question in doubt, it was for the jury, and not the court, to determine. To determine this, the facts which are not in dispute must be adverted to.

The defendant was riding on an open car drawn by two horses. When he was invited to enter, the seats and platforms of the car were filled, and he was obliged to take his place, with others, on the foot-board running longitudinally with the car. The roof of the car was supported by stanchions or posts, opposite to one of which the defendant placed himself. At the point where he entered this car the company had but a single track; farther on, the track was double, with a space of two feet eleven inches between the nearest rails of the two

tracks. Two cars of the sort the defendant was riding on, passing each other on this double track, would be separated by about ten inches along the edges of the two nearest foot-boards, which foot-boards were about nine inches wide each. A person might stand on one foot-board and pass a car on the other track without injury, if the foot-board of the car on such other track were free from passengers. There was not room for persons standing on these foot-boards to pass each other in safety if both foot-boards were occupied by passengers. The plaintiff below was knocked off his car, and injured by colliding with a passenger standing on the foot-board of a like car of the company, passing in an opposite direction along the double track. The plaintiff in error contends that the position of the defendant was obviously so dangerous a one that to take it was, *in se*, negligent.

The plaintiff below was a stranger to this road, unfamiliar with its construction, equipment, and management. Where he entered the company's car the track was single, and there is nothing shown to indicate knowledge on his part that it was different elsewhere. He was invited by the agent of the company to take a position on the car, and when so invited, the only position left for him was that which he assumed. It was therefore taken with the assent of the company's agent. It appears to be the practice of the company to carry passengers there; not only on the car which he boarded, but on the car with which he collided, passengers were being carried in the same way. The mere fact of riding on a platform of a street-car is not conclusive proof of negligence: *Nolan v. Brooklyn R. R. Co.*, 87 N. Y. 63; 41 Am. Rep. 345; *Meesel v. Lynn R. R. Co.*, 8 Allen, 234; *Fleck v. Union R'y Co.*, 134 Mass. 481.

In *Meesel v. Lynn R. R. Co.*, *supra*, it is truly said "that the seats inside the car are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside the car until the car is full, then to stand upon the platforms until they are full, and continue to stop and receive them even after there is no place to stand, except on the steps of the platforms. Neither the officers of this corporation or the managers of the cars, nor the traveling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained upon the ground of its danger. There is therefore no basis upon which the court can decide on the evidence that the plaintiff did not use ordinary care."

In that case, the plaintiff was injured by being thrown from the platform of a moving car.

It has been asserted as a rule of law that a carrier who assigns a passenger in his charge to a position of danger may not, in case of injury, set up the passenger's acceptance of such a position as contributory negligence, but is estopped from so doing. A rule so broadly-stated must admit of many exceptions. The duty of a carrier in transporting passengers is one which calls for a high degree of care, but it is not one amounting to absolute insurance of safety. He has not control of the person of the passenger. He has the right to adopt and enforce reasonable rules for the safety of his passengers, and to these, when made known to him, the passenger is bound to conform. The passenger is at liberty to conclude that rules or directions of the carrier assigning him to place or position are subservient to the duty which the carrier owes him, and that he may take such position in safety, unless to do so would be a blind surrender of care and judgment for his own safety, or an inexcusable failure to use his senses to that end. It certainly cannot be contributory negligence that he, at the invitation of the defendant, exposed himself to risk of danger created by the defendant, and which he did not know, and of which no warning was given.

The position on this outside platform undoubtedly was attended with some risks and exposures. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing. And had the plaintiff received his injury from such cause, it may be that negligence contributing to his injury would be imputed to him. But he was not presumed to know that the company's road was so constructed or its cars so run as to render a position in which it invited him to ride a dangerous one.

If the question of contributory negligence was raised by the case, it was one for the jury, and there was no error in refusing to nonsuit and submitting that question to them.

The judgment should be affirmed.

NEGLECTANCE, WHEN A QUESTION OF FACT: *Delaware etc. R. R. Co. v. Cadore*, 120 Pa. St. 559; 6 Am. St. Rep. 730, and note 732; *Orleans Village v. Perry*, 24 Neb. 831; when a question of law: *Delaware etc. R. R. Co. v. Cadore*, *supra*; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Witty v. C. O. & S. W. R. R. Co.*, 83 Ky. 21. Negligence is
AM. ST. REP., VOL. VII.—51

often a mixed question of law and fact, and should then always be determined by the jury: *Nash v. R. & F. R'y Co.*, 82 Va. 55; *Smith v. R. & D. R. R. Co.*, 99 N. C. 241. Whether one has been guilty of negligence is a question, not only of law, but also of fact, and it is particularly the province of the jury to find the degree of negligence: *Needham v. L. & N. R'y Co.*, 85 Ky. 423.

CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION OF FACT: *Nugent v. Boston etc. R. R.*, 80 Me. 62; 6 Am. St. Rep. 151, and note 162; *Selinas v. Vermont etc. Soc.*, 60 Vt. 249; 6 Am. St. Rep. 114, and note 117; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note 174; *A. G. S. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354, and note 363; *Wallace v. Western N. C. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346, and note 349. When contributory negligence is a question of law: *Seefeld v. Chicago etc. R. R. Co.*, *supra*; *Smith v. R. & D. R. R. Co.*, 99 N. C. 241; note to *Wallace v. Western N. C. R. R. Co.*, 2 Am. St. Rep. 349.

LINDLEY v. O'REILLY.

[50 NEW JERSEY LAW, 636.]

ORAL TESTIMONY TO PROVE ABSOLUTE DEED WAS IN REALITY MORTGAGE is not admissible in an action at law in New Jersey. In the judicial system of that state, the jurisdiction to convert an absolute deed into a mortgage by parol evidence is exclusively in the equity courts.

MORTGAGE IS, IN NEW JERSEY, MERE SECURITY FOR DEBT or liability for which it is given, and payment or satisfaction of the debt or liability discharges the mortgage, and reverts the mortgaged premises in the mortgagor without a reconveyance.

SUITS AFFECTING LANDS IN ANOTHER STATE, JURISDICTION OF EQUITY IN. — IN CASES OF CONTRACT, TRUST, OR FRAUD, THE EQUITY COURTS of one state or country having jurisdiction of the parties are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another state or country. But this jurisdiction is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience, and the decree in such suit imposes a mere personal obligation, enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction, to create, transfer, or vest a title.

COURTS OF ONE STATE HAVE NO JURISDICTION OVER TITLE TO LANDS IN ANOTHER state or country. And the clause of the federal constitution requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state is subordinate to this rule, and applies to the records and proceedings of the courts only so far as they have jurisdiction.

POWER OF EXECUTOR TO SELL LANDS ARISES BY IMPLICATION, WHEN. — Where a testator imposes upon his executor trusts to be executed or duties to be performed which cannot be executed or performed without an estate in his lands or a power of sale, although no estate or power be expressly given by the will, the executor will take by implication an estate in the lands, or at least a power of sale, sufficient to enable him

to execute the trusts or perform the duties imposed upon him, and in either event his deed will convey the legal title. And if such a conveyance be prematurely made, or for an inadequate consideration in breach of trust, the title will nevertheless be good at law, and the relief will be in equity, and at the instance only of the *cestui que trust* whose interests have been prejudiced thereby.

LEGISLATURE HAS POWER TO VALIDATE DEEDS IMPERFECT FROM MERE INFORMALITIES.

PROBATE OF WILL IN FOREIGN JURISDICTION IS CONDITION PRECEDENT TO MAKING RECORD THEREOF in New Jersey, and the fact of such probate must appear by the certificate transmitted with the exemplified copy of the will. If the surrogate record a will without such certificate, his record is a nullity, and he can make no transcript of such a record which will be competent evidence. An affidavit of an attorney at law that the will has been admitted to probate in the state from which the copy is exemplified is not sufficient.

PROOFS UPON PROBATE OF FOREIGN WILL, WHEN MUST BE EXEMPLIFIED.

— When the object of making a will admitted to probate in another state a record in New Jersey is to use it in making title to lands, the record exemplified from such other state must contain the proofs taken on the probate there, that it may appear therefrom that the will was made and executed in the manner and with the formalities prescribed by the statute of New Jersey for devises of land.

EJECTMENT. The opinion states the case.

Thomas B. Harned and D. J. Pancoast, for the plaintiff in error.

Peter L. Voorhees and James H. O'Reilly, for the defendant in error.

DEPUE, J. Patrick O'Reilly died in 1881. In his lifetime he was seised of a tract of land in the county of Atlantic, in this state, the subject of controversy in this suit. By his will, dated December 5, 1877, proved before the surrogate of Atlantic County July 5, 1881, and letters testamentary granted thereon, he devised his entire estate to the plaintiff, his wife, for life. Exception was taken to the admission of a certified copy of this will, but the printed case does not contain a full copy of the will, nor does any assignment of error touch the competency of this evidence. It must be assumed that this will was duly executed to devise lands under the laws of this state, and that the same was duly probated to make a certified copy competent evidence. On this presentation of title the plaintiff would have been entitled to a verdict.

The obstacle in the way of the plaintiff's recovering, in virtue of her title under her husband's will, arose from a deed made by O'Reilly and wife to one Henry Francis Felix, on

the 14th of January, 1861. This deed purported to be an absolute conveyance, in fee-simple, for the consideration of eighteen thousand dollars. To sustain title under her husband's will, it was necessary for the plaintiff to overcome or extinguish the legal title thus conveyed.

The plaintiff contended, at the trial, that the deed to Felix was in fact a mortgage, and that the debt or liability for which it was given was paid and satisfied, and that on the discharge of the obligation for which the conveyance was made, the estate of the mortgagee was extinguished. In a trial at law, it is not competent to show, by oral testimony, that an absolute deed was in reality a mortgage. In our judicial system, the jurisdiction to convert an absolute deed into a mortgage by parol evidence is exclusively in the equity courts. The competency and effect of the evidence produced by the plaintiff for this purpose are the issues raised by the bill of exceptions and assignments of error.

Felix died in 1866. By his will, he gave all his property for the benefit of his wife, Alicia Kate, and a charitable society known as the Sisters of the Immaculate Heart of Mary, and made the Right Reverend James F. Wood, Roman Catholic bishop of Philadelphia, executor.

Felix, at the time of his death, resided at Reading, in the county of Berks, Pennsylvania. On the 4th of December, 1867, O'Reilly filed a bill of equity in the court of common pleas of the county of Berks against the Right Reverend James F. Wood, executor of the last will and testament of Henry F. Felix, Alicia Kate Felix, widow of said Henry F. Felix, and the religious order of the Sisters of the Immaculate Heart of Mary.

The bill set out that the Right Reverend James F. Wood was a resident of Philadelphia, that Alicia Kate Felix resided in Reading, and that the religious order of the Sisters of the Immaculate Heart of Mary was a society established in Reading. It charged that the deed of conveyance made by O'Reilly to Felix was, in legal effect, a mortgage; that the same was made as security to indemnify Felix against his liability on certain promissory notes made by O'Reilly and indorsed by Felix, and discounted by the Farmers' Bank of Reading, and under protest, and that subsequently the said notes were fully paid and satisfied by the said O'Reilly; that the said Felix sustained no loss or damage in consequence of the said indorsements, and prayed a reconveyance of the legal title. The

defendants named in the bill appeared and filed an answer. By consent of parties, an examiner was appointed January 27, 1868, who filed his report November 1, 1869, and in September, 1880, the case was brought on for hearing, by consent, on the bill, answer, and report of the examiner; and on the 20th of September, 1880, a decree was signed, in which, after reciting that the court being satisfied that the allegations of the plaintiff's bill were correct and true, and that all the notes indorsed by Felix and liabilities incurred by him for O'Reilly had been by O'Reilly fully paid, discharged, and satisfied, it was ordered and decreed that the Right Reverend James F. Wood, executor of the last will and testament of deceased, should execute and deliver to Patrick O'Reilly a deed of reconveyance of the premises in fee-simple.

All the parties to the suit resided in Pennsylvania. The Pennsylvania court had jurisdiction of the parties, and also of the subject-matter of the suit. The contested problem is the effect of its decree upon the title to lands in this state. If the decree can affect the title to lands in this state, it extinguished the Felix title without a reconveyance; for in this state a mortgage is regarded as a mere security for the debt or liability for which it is given, and payment or satisfaction of the debt or liability discharges the mortgage, and revests the mortgaged premises in the mortgagor without a reconveyance: *Shields v. Lozear*, 34 N. J. L. 496; 3 Am. Rep. 256; *Kloepping v. Stellmacher*, 36 N. J. L. 176; *Jackson v. Turrell*, 39 Id. 329; *Schalk v. Kingsley*, 42 Id. 32.

Ever since *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, it has been established law that in cases of contract, trust, or fraud, the equity courts of one state or country having jurisdiction of the parties are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another state or country. The principle upon which this jurisdiction rests is, that chancery, acting *in personam*, and not *in rem*, holds the conscience of the parties bound without regard to the *situs* of the property. It is a jurisdiction which arises when a special equity can be shown which forms a ground for compelling a party to convey or re-lease, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience. If it went beyond that, the assumption of jurisdiction would not

only be presumptuous, but ineffectual: Westlake on International Law, 57, 58. The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment, or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer, or vest a title. The cases on this subject are numerous. They are collected in the note to *Penn v. Lord Baltimore*, 2 Lead. Cas. Eq. 1806 (923); Brett's Lead. Cas. Eq. 254; *Ewing v. Orr Ewing*, L. R. 9 App. C. 34; *Norris v. Chambres*, 29 Beav. 246; *Massie v. Watts*, 6 Cranch, 148; *Wood v. Warner*, 15 N. J. Eq. 81; *Vaughan v. Barclay*, 6 Whart. 392.

In *Davis v. Headley*, 22 N. J. Eq. 115, the complainant obtained a decree in the circuit court of Kentucky against Headley that a conveyance of lands in New Jersey, made by the complainant, should be rescinded and set aside, the possession restored, and the defendant enjoined from setting up the conveyance. He then filed a bill in the court of chancery of this state to enforce the decree. The jurisdiction of the parties and of the subject-matter of that suit was undisputed. The bill to enforce the decree was, nevertheless, dismissed. Chancellor Zabriskie, in dismissing the bill, declared that it was a well-settled principle of law in the decisions of England and of this country, and acquiesced in by the jurists of all civilized nations, that immovable property is exclusively subject to the laws and jurisdiction of the courts of the state or nation in which it is located, and that no other laws or courts could affect it. He added: "I find no case in which a statute, judgment, or proceeding in one country has been held to affect such property in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree." After referring to *Penn v. Lord Baltimore*, *supra*, and the cases in which decrees for specific performance of contracts relating to lands without their jurisdiction were made, the learned chancellor said: "But in these cases it is admitted, as it was by Lord Hardwicke, that these decrees could not affect the land, but could only be enforced where the court had jurisdiction of the person of the defendant, and thus compel him to execute the conveyance. In such cases, it is the conveyance, and not the decree, that has the effect."

A similar precedent in the federal courts enforced the same view: *Watts v. Waddle*, 1 McLean, 200; 6 Pet. 389. Lands situate in Ohio were covered by two patents, one issued to Powell and the other to Watts. To remove this cloud upon

his title, Watts commenced a suit against Powell's heirs in the circuit court for the district of Kentucky, and obtained a decree sustaining his title. The court had jurisdiction of the parties. By the decree, the defendants were required to convey the premises to the complainant. A statute of Kentucky authorized the court, in case the defendant in such a suit failed to convey, to appoint a commissioner to make conveyance. By the decree, a commissioner was appointed, and no conveyance having been made by the parties, a deed was executed by the commissioner. A suit afterwards brought in the federal circuit court of Ohio brought in question the effect of the decree of the Kentucky court, and of the commissioner's deed in execution of it, upon the title to the lands. The court held that neither the decree nor the commissioner's deed vested the legal title in the complainant. In the opinion in the supreme court, Mr. Justice McLean said: "The most decisive objection to the decree against Powell's heirs is, that it does not vest the legal title in Watts. A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt."

These cases rest upon the rule, which is firmly established, that the courts of one state or country are without jurisdiction over title to lands in another state or country. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state is subordinate to this rule, and applies to the records and proceedings of the courts only so far as they have jurisdiction: *Public Works v. Columbia College*, 17 Wall. 521; *Watts v. Waddle*, 6 Pet. 389; *Brine v. Insurance Co.*, 96 U. S. 627, 635; *Davis v. Headley*, 22 N. J. Eq. 115, 121; *Nelson v. Potter*, 50 N. J. L. 324.

The Pennsylvania court having no jurisdiction over title to lands in this state, its decree, though conclusive within the jurisdiction which pronounced it, cannot be allowed to affect the title to these lands. It could not, therefore, operate to convert the deed to Felix into a mortgage, and then decree it a satisfied encumbrance. For this reason, as well as another which will be presently stated, the decree did not extinguish the Felix title.

The plaintiff also offered in evidence a deed made by Wood to Patrick O'Reilly, dated October 16, 1869, whereby the

premises in suit were reconveyed to O'Reilly. This deed was made pending the equity suit, after the evidence in that suit was taken, and before final decree. It sets out the substance of O'Reilly's bill as to the nature and purpose of his deed to Felix, and the payment and discharge by O'Reilly of the debt or liability to secure which the deed was given, and recites that the grantor is satisfied that the allegations in the bill are true, and in formal words it reconveys the premises to O'Reilly in fee.

The competency and effect of this deed depend upon the question whether Wood had an estate in or power over the lands whereof Felix died seised, to enable him to make a conveyance therefor. I will examine this subject on the assumption that the will of Felix was properly admitted in evidence.

By his will Felix disposed of all his estate, real, personal, and mixed. His testamentary disposition was upon certain trusts for the benefit of his wife during her lifetime, and after her death, for the establishment of a charitable institution. He constituted and appointed the Right Reverend James F. Wood, Roman Catholic bishop of Philadelphia, and his successors in office, executors, so long as this property shall remain situated in the said diocese, and provided that "should this property at any time become situated in any other diocese, then and in that case the Roman Catholic bishop of said diocese, and his successors in office, shall be the executors of the trust, with all the powers hereby given to the said Right Reverend James F. Wood, and his successors in office."

The testator's will created three distinct classes of trusts: 1. For the benefit of his wife during her lifetime; 2. The appropriation of his estate to the purchase of a farm on which to erect the charitable institution, and the erection of suitable buildings thereon; and 3. For control over the institution when established. In connection with each of these trusts, and especially those mentioned in the first and second classes, with which we are concerned at this time, the will devolved upon the executor active duties. It provided that the testator's widow should, during her lifetime, have the interest (i. e., the interest and income) of all his estate, real, personal, and mixed. It also directed that if the interest arising annually should not be sufficient to maintain her in her widowhood, "my executor or his successors shall give her annually a sufficient amount of the principal to maintain her according to her state of life, the same as she is now leading"; and "should

she marry again, she shall only have the interest of all my estate, real, personal, or mixed, of whatever nature it may be, until her death; but she shall not be permitted, by my executor or his successors, to receive any part of the principal to maintain herself and family." The testator's wife survived him, and was living and unmarried in February, 1868, when her testimony was given in the equity suit, and there is no proof of her death or marriage since that time.

With respect to the charitable institution, the testator did not set apart any lands whereof he died seised on which the buildings should be erected. He directed the executor, or his successors in office, to purchase a suitable farm in the vicinity of the city of Reading for that purpose. For the erection of buildings the testator provided as follows: "The balance of the money arising out of my estate, if any, after the death of my beloved wife, Alicia Kate, and the purchase of the aforementioned farm, shall be appropriated for the erection of suitable buildings for a sisterhood and a seminary of learning for young ladies, under the direction of the bishop of the diocese in which these lands are situated. Should there be a surplus after the above directions are faithfully carried out, then the balance shall be put out at interest and applied for improvements in buildings, as necessity requires." He also directed that the lands purchased should, at no time, be encumbered by judgment, bond, or mortgage, and should forever remain free and unencumbered, and that any improvements made thereon should be paid for in cash, or its equivalent, at the time the improvements were made.

In a subsequent clause the testator provided for the event of the death of his wife in his lifetime, and in that case he directed that all his estate, of whatever nature it might be at the time of his death, should at once be appropriated towards the fulfillment of the aforementioned objects, namely, the purchase of the said mentioned farm and the erection of suitable buildings, as aforementioned.

In the clause of his will in which the testator designated his executor he had in view the visitorial powers to be exercised over the institution after it had been established. That is apparent from the phrase, "as long as the said property shall remain situated in said diocese; but should this property at any time become situated in any other diocese, then," etc. But no such qualification or limitation was imposed with respect to the property or estates out of which the interest or

income or the principal was to be derived for his wife's support, or out of the proceeds of which the farm for the institution was to be purchased and the buildings erected. To these purposes the testator's entire estate, real, personal, and mixed, wherever situated, of whatever nature it might be, at his death, was devoted, to be applied by his executor or his successors in office.

The will contains no devise to the executor in express words, nor is there any express grant of power to make sale or disposition of any lands of which the testator died seised. In consequence of a doubt whether such estate or power might be implied, an act was obtained from the legislature of Pennsylvania authorizing the executor to sell and convey lands. For reasons already given, this statute is of no avail. To support the conveyance by Wood, an estate or a power of sale vested in him must be deduced from the will itself.

The instances are numerous in which courts of law, as well as courts of equity, in the constructions of wills, have implied an estate or power of sale in an executor or trustee from the nature, character, and extent of the trusts or duties imposed on him. Mr. Lewin states these propositions as rules of construction adopted by the courts: 1. Whenever a trust is created, a legal estate sufficient for the execution of a trust will, if possible, be implied; 2. The legal estate limited to the trustee will not be carried further than the complete execution of the trust requires. And, in exposition of the first rule, he adds that the court has, in some instances, supplied the estate *in toto*; as where a testator devised to a *feme covert* the issues and profit of certain lands to be paid by his executors, it was held that the land itself was devised to the executors, in trust, to receive the rents and profits and apply them to the use of the wife: 1 Lewin on Trusts, 8th ed., 212, 213. In further illustration of the rule, the author says: "Thus a trust to sell, even on a contingency, conveys a fee-simple, as indispensable to the execution of the trust, and the construction is the same in a sale implied as where the devise is upon a trust out of the rents and profits of an estate to discharge certain legacies made payable at a day inconsistent with the application of the annual profits only": 1 Id. 213. Another illustration is given in these words: "If a testator simply appoints his executor and trustee, it seems the latter word is not so exclusively applied to real estate as to carry by implication a devise of the testator's freehold; but if the testator directs certain acts to be

done by the trustee or by the executor, which belong to the owner of the freehold, or which require that the trustee or executor should have dominion over the real estate, such a devise will be implied": 1 Id. 214.

A devise of the rents and profits of certain lands to J. S., the wife of J. S., "to be paid by my executors to her," the executors shall thereby take the lands in trust to receive the rents, issues, and profits to the use of the wife: *Bush v. Allen*, 5 Mod. 63. A gave an annuity to B for her life, to be paid out of certain lands by his executor; held, that the executor took an estate for the lifetime of the annuitant: *Jenkins v. Jenkins*, Willes, 650. In that case Lord Chief Justice Willes laid down these rules: "1. That an heir at law shall not be disinherited but by express words, necessary implication, or manifest intent; 2. That every devise must be considered as intended to be beneficial to the devisee; 3. That every devisee who is to pay anything out of an estate must have such an interest in it as will enable him to pay it, otherwise the intention of the deviser will be frustrated." He added: "As the annuity is to be paid by the executor, the intent of the deviser cannot take place unless the executor has at least such an estate in the lands devised as will last as long as the annuity is payable." In *Doe v. Woodhouse*, 4 Term Rep. 89, A devised his real and personal estate to his wife for life, and directed part of his personalty to be sold after his wife's death. He gave two annuities to A and B, to be paid by his executor out of his whole estate, to commence after his wife's death. He then devised "the remainder of the profits after his wife's death, and after the yearly payments to the annuitants out of his whole estate," to C, D, and E. It was held that without any express devise to the executor he took a fee. Lord Kenyon said: "As these annuitants were to take a beneficial interest out of the real estate, and the payments were to be made by the executor, the latter must of necessity take a fee in order to answer the charges upon them. . . . It is clear that in this case the whole estate vested in the executor by the way of a use executed, because that which he was required to do could not be answered by a less *quantum* of estate."

In *Oates v. Cooke*, 3 Burr. 1684, the testator gave several annuities, some for life, some in fee. One of the annuities for life he directed to be paid by his trustee or executor, and added: "These legacies to be faithfully paid by my trustee, John Cooke, every year and yearly, a month after Martinmas."

After several small legacies and directions, he added: "And I do hereby constitute John Cooke, before mentioned, sole executor and trustee of this my last will and testament, he paying all my just debts, legacies, and funeral charges." It was held that all the testator's freehold and copyhold estate passed to Cooke in fee. Mr. Justice Wilmot said: "Cooke, the trustee, took the legal estate by this devise. The intention of the testator is to be collected from all parts of the will taken together; and if it be thereupon necessary to imply it, it is the same thing as if it was particularly expressed. Now, here are trusts to be executed which the trustee could not execute without having an estate in fee devised to him. No particular technical terms are requisite; it is sufficient if the implication be strong, violent, and necessary.

In *Anthony v. Rees*, 2 Crompt. & J. 75, the testator gave to his wife "the sum of twenty pounds, yearly and every year, to be paid out of the freehold estates and the lease of Penlan by trustees hereinafter named." He then appointed E. and G. "as trustees to look in that justice should be duly administered between the said parties." It was held that the legal estate vested in the trustees. Bailey, B., said: "When trustees are directed to do anything for the performance of which the legal estate is requisite, then they are to have the legal estate. Now, here they are to pay out of the legal estate. How can they do so except by taking the rents and profits, and paying the annuity out of them. . . . If trustees are to pay out of lands, there are many cases which show that they must take the legal estate. On the whole, I entertain no doubt that the legal estate vested in the trustees, it being necessary for the performance of their duties." *Doe v. Haslewood*, 6 Ad. & E. 167; *Doe v. Pratt*, 6 Id. 180; *Doe v. Gillard*, 5 Barn. & Ald. 785; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81; *Shaw v. Weigh*, 2 Strange, 798; *Davies to Jones*, L. R. 24 Ch. Div. 190; *Gibson v. Lord Montfort*, 1 Ves. Sr. 489,—are precedents in the same line of decision. See also Hill on Trustees, 232.

A power in the executor to sell lands of the testator, where a power of sale is not expressly given, will arise by implication under similar circumstances, the only distinction between the implication of an estate and that of a power being that where the purposes of a trust can be fully accomplished by a sale without an actual estate, the executor will take a power to sell, instead of an estate: *Vanness v. Jacobus*, 17 N. J. Eq. 153; *Dewey's Ex'rs v. Ruggles*, 25 Id. 35, 37; *Haggerty v. Lan-*

terman, 30 Id. 37; *Belcher v. Belcher*, 38 Id. 126; *Craig v. Craig*, 3 Barb. Ch. 77, 94; *Tucker v. Tucker*, 5 N. Y. 408. Chief Justice Shaw stated the rule in these words: "If a testator, having a right to dispose of his real estate, directs that should be done by his executor which necessarily implies that the estate is first to be sold, a power is given by this implication to the executor to make such sale and execute the requisite deed of conveyance": *Going v. Emery*, 16 Pick. 107, 112; 26 Am. Dec. 645.

The testator blended together his real and personal property, and disposed of it as a common fund, under the designation of "his estate." In the provision for his wife, he contemplated that his estate, real, personal, or mixed, might be converted into money, in the event of the principal being at any time needed for her maintenance, and the principal money so required he directed to be given to her annually by his executor. He intended, likewise, that his entire estate should be converted into money after his wife's death, to purchase lands and erect buildings for the charitable institution. In the clause providing for the building, he designated the fund to be so applied as "money arising out of my estate," and directed that if any surplus remained, "the balance shall be put out at interest." In making provision, in the event of the death of his wife in his lifetime, he directed that all his estate, of whatever nature it might be at the time of his death, should be appropriated to the purchase of the farm and the erection of suitable buildings.

The objects the testator had in view in the testamentary disposition of his property could not be effectuated unless his estate were convertible into money. Nor could his executor perform the duties of his trust to appropriate the testator's property to those objects without an estate in his lands, or power to convert them into money. Under the rule above stated, the executor took a fee by implication in the testator's lands, or at least a power of sale. In either event, his deed would convey the legal title. If conveyance was prematurely made, or for an inadequate consideration, in breach of trust, the title would, nevertheless, be good at law. The relief would be in equity, and at the instance only of the *cestuis que trust* whose interests were prejudiced thereby: *Hill on Trustees*, 278-282, 283; 2 *Lewin on Trusts*, 572. The defendant does not hold under the Felix title. He could not defeat title under the executor's deed upon the equitable rights of the *cestuis que*

trust. He is simply in possession, without any title disclosed except mere possession.

The deed from Wood contains a recital of the act of the legislature of Pennsylvania empowering him to make sale of the testator's lands, and of the circumstances under which the deed to Felix was made, and was executed by the grantor as executor. In a deed under a power, the intention to execute the power must appear on the face of the deed; but it is sufficient that it appears inferentially: *Munson v. Berdan*, 35 N. J. Eq. 376, 378; *Warner v. Connecticut Mutual Ins. Co.*, 109 U. S. 357, 365. If there be any informality in the deed in this respect, it was cured by the validating act passed by the legislature of the state: Pamph. Laws 1872, p. 357. The power of the legislature to validate deeds imperfect for mere informalities is undoubted.

To complete the chain of title from Felix, it was necessary for the plaintiff to show title in Wood, and this could be done only by proof of the Felix will. A copy of this will, certified by the register of probate of the county of Berks, authenticated in the manner prescribed by the act of Congress, was filed and recorded in the office of the surrogate of Atlantic County, April 11, 1882, and a transcript of that record, certified by the surrogate, was produced and received in evidence as proof of the will.

The common-law method of proving a devise of lands was the production of the original will and proof of its execution by the subscribing witnesses. At an early day, provision was made for the admission of a certified transcript of a will regularly proved and recorded in the prerogative office, or the office of the surrogate of any county in this state, as *prima facie* evidence of the title to land: Revision, 756, secs. 21, 22; *Allaire v. Allaire*, 37 N. J. L. 312; 39 Id. 113. The fourth section of the act of March 17, 1713-14, made provision for the admission in evidence, as proof of title to lands, of a copy of a will made in another colony, being duly proved according to the custom of such colony, and certified under the great seal: Revision, 1250, sec. 37. By the act of March 28, 1866, it was provided that when any will shall have been admitted to probate in any state or territory of the United States, and any person shall desire to have the same recorded in this state for the purpose of making title to lands in this state, it should be lawful for any surrogate of any county in this state, upon an exemplified copy of such will being filed in his office, exem-

plified and attested as a true copy in the manner required by the laws of the state or territory in which such will shall have been admitted to probate, to make it legal evidence in such state, to record such will, and file the said copy in his office; and any such will, upon being so recorded, should have the same force and effect, with respect to all lands and real estate therein devised, as if the same had been admitted to probate in this state; and such record, or certified copies thereof, should be received in evidence in all courts of this state: Revision, 757, sec. 26. This act was repealed in 1872 (Pamph. Laws, 58), and restored in 1873 (Id. 168), and re-enacted March 17, 1882, with the addition that all conveyances of such real estate theretofore or thereafter made by any executor, or by any devisee, should be as valid as if the said will had been admitted to probate in this state: Pamph. Laws 1882, 112. The legislation on this subject is stated, and the force and effect of transcripts of the records of wills, when in evidence as proof of title to lands, are considered in *Allaire v. Allaire*, 37 N. J. L. 312, and *Nelson v. Potter*, 50 Id. 324.

The statutes which substitute transcripts in place of the production of the will and proof by subscribing witnesses as evidence of title to lands apply only to wills that have been admitted to probate. The surrogate is not authorized to record any foreign will that may be exemplified and attested in the manner designated in the statute. He has no jurisdiction to make such a record, unless it be of a will that has been admitted to probate in the state from which the copy has been exemplified. His official act in recording and filing the copy of the will is like the official act of the county clerk in recording deeds. The clerk is authorized to make a record of deeds which have been acknowledged and certified according to law; and his entry on the record of a deed not so acknowledged does not make his record, or a certified copy thereof, competent evidence: *Fox v. Lambson*, 8 N. J. L. 275, 280; *Harker v. Gustin*, 12 Id. 42, 43. The legislature did not intend to make a foreign will evidence without any proof, except that the paper purported to be a will. Probate in the foreign jurisdiction, as evidence of the *factum* of the will, is a condition precedent to making a record in this state. The surrogate's jurisdiction to make the record being dependent upon the fact that the will had been admitted to probate in the state from which the copy was exemplified, that jurisdictional fact must appear by the certificate transmitted with the copy

of the will. If the surrogate record a will without such certificate, his record is a nullity, and he can make no transcript of such a record which will be competent evidence.

In the certificate attached to the copy of this will, the register of probate certified "the foregoing to be a true and correct copy of the original last will and testament of Henry Francis Felix, deceased, as filed in the register's office in and for the county of Berks." It did not in any way appear before the surrogate that the will had been admitted to probate in Pennsylvania, except by the affidavit of an attorney at law practicing in that state, that the said will had been duly proved and admitted to probate, as well as recorded in the office of the register of wills of Berks County. This affidavit was not competent to establish that fact.

The probate of a will is a judicial act, to be proven by a sworn or duly certified copy of the record, or at least by the certificate of the officer before whom the probate is made. And where the object of making such a will a record in this state is for the purpose of making title to lands, the record exemplified from another state must contain the proofs taken upon the probate, that it may appear by such proofs that the will was made and executed in the manner and with the formalities prescribed by the statute of this state for devises of lands. Without such proofs, the record, however authenticated, is not even *prima facie* evidence of title to lands: *Allaire v. Allaire*, 37 N. J. L. 312; 39 Id. 113; *Nelson v. Potter*, 50 Id. 324.

The court erred in admitting the transcript of the will in evidence, and in directing a verdict for the plaintiff.

For these reasons, the judgment should be reversed.

ORAL EVIDENCE, WHEN ADMISSIBLE TO EXPLAIN WRITTEN INSTRUMENTS: *McFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111, and note 114; or to establish a fact collateral to written instruments: Id. In case of equivocal written instruments, the circumstances under which they were made, or facts collateral thereto, may be admitted to show the intention of the parties: *French v. Williams*, 82 Va. 462. Oral testimony may, in some states, be admitted to show warranty, or other agreement relating to land, outside of the written statements in the deed: *Green v. Batson*, 71 Wis. 54; 5 Am. St. Rep. 194, and note 197; and in case the writing shows an admission, either directly or by fair inference, the jury should be instructed to find, in reference to the matter omitted, what the parties intended to have inserted therein: *Looney v. Rankin*, 15 Or. 617.

NO STATE CAN BY ITS LAWS, AND NO COURT CAN BY ITS JUDGMENTS OR DECREES, directly bind or affect property beyond the limits of that state: *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126, and see note 128. Id., as

to equitable jurisdiction to deal with land beyond the state. The courts of one state have no jurisdiction of an action for trespass upon lands situated in another state: *Dodge v. Colby*, 108 N. Y. 445.

POWER OF SALE CONFERRED BY IMPLICATION UPON EXECUTORS. — Power to sell is incident to the office of executor, without directions to that effect in the will: *Bond v. Zeigler*, 1 Ga. 324; 44 Am. Dec. 656. An executor takes a power of sale by implication, where a testator devises an estate with directions to be sold, but does not say by whom to be sold, provided the proceeds are distributable by the executor: *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 205; *Davis v. Hoover*, 112 Ind. 423. For power of sale by implication to executors, see note to *Rankin v. Rankin*, 87 Am. Dec. 209-214. But where no express power is given to executors to sell realty, a power will not be implied from the mere charge of debts upon the lands: *Will of Fox*, 52 N. Y. 530; 11 Am. Rep. 751.

FOREIGN WILLS may be recorded in the circuit court of Kentucky without further probate there, when the foreign probate is properly authenticated, and when so recorded, are of the same effect as if originally probated in Kentucky in the proper county: *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41. But in Rhode Island a will made in another state by one domiciled there must be properly probated in Rhode Island before it can operate on land in that state: *Olney v. Angell*, 5 R. I. 198; 73 Am. Dec. 62. For conflict of laws on the probate of wills, see note to *Grimes's Estate v. Norris*, 65 Am. Dec. 547; and as to statutes in regard to probate of wills in other states, see note to *Bowen v. Johnson*, 73 Am. Dec. 56-62.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STERLING v. RYAN.

[72 WISCONSIN, 36.]

NOVATION. — Where contractors, with the consent of all the parties, retain out of the wages of laborers employed by them an amount of money due from the laborers to boarding-house keepers, to be paid by the contractors to the boarding-house keepers, the laborers discharging their claims for labor, and the boarding-house keepers discharging the laborers, this is a case of novation, and the boarding-house keepers may recover from the contractors in an action of *assumpsit* for money had and received to and for their use.

APPEAL. The opinion states the case.

Winans and Hyzer, for the appellants.

Butt and Graves, and Ogden H. Fethers, for the respondent.

ORTON, J. The facts of this case appear to be substantially as follows: D. C. Shepard & Co. of St. Paul, Minnesota, were the original contractors to build sections 136 to 140, and sections 146 to 148, of the railroad of the Chicago, Burlington, and Northern Railway Company, near the village of Victory, Vernon County, in this state, and in September, 1885, subcontracted said sections to the defendants; and said defendants subcontracted said sections 146 to 148 to one John A. Peterson in October, 1885, but he commenced upon his work in September. The contracts were all substantially alike, except in the price to be paid, and each one contained such a provision that the railway company, D. C. Shepard & Co., and the defendants reserved the right to pay the laborers on said works, in order to prevent any liens therefor being placed upon the road.

The work upon the last-named sections continued from the 1st of September, 1885, to the 1st of January, 1886. The laborers were chiefly transient people, and many of them foreigners, who followed railroad grading as a business, and a large force of them and many teams were employed in and about the grading and construction of the road-bed on said sections; and these laborers were boarded by different persons, residents of said village of Victory, and among whom was the plaintiff, by contract with the laborers themselves who were directly liable to pay therefor. It was the customary manner of doing business on these sections between the defendants Peterson, the laborers, and the boarding-house keepers, that the pay-rolls were made out, under the direction of Peterson, for the work, board, and supplies of the previous month; and they contained the names of the laborers, the number of days they had worked, the rate per day, the total amount earned, deductions for board furnished, and the balance due them. The defendants then paid the laborers, or caused them to be paid, deducting their board bills so furnished, and they were paid to the boarding-house keepers. For the months of November and December, 1885, the laborers were paid in this way, and their board bills deducted, and the amount thereof was retained by the defendants to be paid directly to the several boarding-house keepers, at the instance of and by an arrangement with such laborers, in accordance with the usage and custom of the previous months. These are the bills of the said several boarding-house keepers which the plaintiff holds by assignment, together with his own, which constitute his cause of action in this case.

It is claimed on behalf of the plaintiff: 1. That by virtue of such usage and custom the defendants impliedly promised and agreed to pay said bills, and thereby induced said boarding-house keepers to board said laborers, and became liable to pay the same; and 2. That said laborers paid to said defendants, or left in their hands, the amount of said board bills, to and for the use of the said boarding-house keepers. The jury found "that there was no express agreement or promise made by the defendants to the boarding-house keepers to pay them for the board of the men for whose board this action was brought." But they also found that the defendants promised to pay the board bills of some of the men "when they made payments according to the pay-rolls." This probably means that there was an implied promise on the part of the defend-

ants to pay to the boarding-house keepers their board bills against the laborers, which they had deducted and retained from what was due the laborers for that purpose. The jury found, also, that when portions of the laborers' bills for the months of November and December were paid by the defendants, the balance unpaid was to be paid to the respective persons with whom they had boarded, in satisfaction of their board; and that such was the understanding between the defendants and said laborers, and this was done with the approval of the several persons with whom they had boarded, and with their understanding that they should receive the same from the defendants. To support these findings the time-checks made out of the laborers' work, with board bills deducted, and the balance receipted by the laborers, were in evidence, and in all cases the board bills were deducted to be paid directly to the boarding-house keepers. It appears, also, that this manner of doing business was assented to by Peterson and by the defendants, as well as the laborers and boarding-house keepers.

This appears to us to be a very plain case. The defendants undertook to pay the laborers, as they had a right to do under their contract with Peterson, to prevent liens on the road. They did pay the laborers in full, but only by paying them the balance after deducting their board bills, and by agreeing to pay their board bills to the several boarding-house keepers who had boarded them. They have paid the laborers in full, or they have not. If they have not, then they ought to pay them as they have undertaken to do. They hold receipts from the laborers which answer for full payment. But they have not retained them in full. They retained what the laborers owed to the boarding-house keepers, and agreed with the laborers to pay that part of their wages directly to the boarding-house keepers, and with their assent also. Do they not withhold moneys that justly belong to the boarding-house keepers? They certainly withhold money that was virtually paid to them by the laborers to and for the use of the boarding-house keepers. We see no reason why such money cannot be recovered in *assumpsit*, which is an equitable action in its nature, as for money had and received, or for money paid to the use of the plaintiff. The jury found that there was an implied promise on the part of the defendants to pay these boarding-house bills when they made payments according to the pay-rolls. There was really no finding that any promise

was implied by the manner of making such payments for the months of September and October, for their making payments according to the pay-rolls may as well mean the payments to the laborers for the months of November and December, deducting the board bills.

This is our understanding of the facts of this case. It is quite different from the understanding of the facts by the learned counsel of the appellants, as appears by their briefs, but we are compelled to differ with the learned counsel both as to the facts and the law. The charge of the court to the jury in respect to any contract, express, or implied by the manner in which the defendants had before paid the board bills, and excepted to by the appellants' counsel, was certainly sufficiently guarded by making such liability depend upon the fact that the boarding-house keepers refused to board the laborers without such undertaking on the part of the defendants, and assented to do so only upon such an understanding. The *gravamen* of the instructions relates to the implied promise of the defendants to pay the boarding-house keepers by deducting the money due them from the bills of the laborers and retaining the same. To dispose of all possible exceptions to the charge of the court, we may say that if the court had instructed the jury that the plaintiff, if the owner of the cause of action as stated in the complaint, was entitled to recover on proof of the above facts, it would have been a correct statement of the law of the case. As we have stated it, and it is believed correctly, it is a clear case of novation. The defendants owed the laborers more than they had paid them. The laborers owed their boarding-house keepers just that amount. The defendants, by the assent of all parties concerned, retained said amount to be paid to the boarding-house keepers, and the laborers virtually discharged their claims for labor, and receipted them to the defendants, and the boarding-house keepers discharged the laborers on such understanding. This is a valid arrangement. The defendants withhold moneys that by this arrangement belong to the boarding-house keepers, or to this plaintiff as their assignee. This is a very common business transaction.

In *Sharpless v. Welsh*, 4 Dall. 279, A placed in the hands of B a bill of exchange, and ordered B to negotiate it, and pay the proceeds to certain creditors of A; and B promised to do so, and notified the creditors of the order. This was held to be a valid novation. Similar transactions were held valid

and binding upon all the parties in *Palmer v. Mason*, 42 Mich. 146, and *State Bank v. Chapelle*, 40 Id. 447; and in *Little Wolf R. Imp. Co. v. Jackson*, 66 Wis. 42; *Drake v. Harrison*, 69 Id. 99; *Murphy v. Hanrahan*, 50 Id. 485; *York v. Orton*, 65 Id. 6. The case of *Bull v. Brockway*, 48 Mich. 523, is almost exactly in point, and the recovery was in *assumpsit*. The case of *Schuster v. Kansas City etc. R. R. Co.*, 60 Mo. 290, is nearly a parallel case to this. The only difference is, that the bills deducted from the laborers' pay-rolls were merchant bills. "An agent to collect a debt, who, with the consent of the debtor, credits it to his principal, and charges himself with it, may collect the same from such debtor": *Emerson v. Baylies*, 19 Pick. 55. "One in whose hands money is placed by a debtor for the payment of a debt is liable in an action for money had and received at the suit of the creditor to whom the money was to have been paid, and there need not be any privity between the parties, or any promise to pay other than that which is implied or results from one man's having another's money which he has no right to retain": *Stoudt v. Hine*, 45 Pa. St. 30; *Brand v. Williams*, 29 Minn. 238; *Calais v. Whidden*, 64 Me. 249; *Lewis v. Sawyer*, 44 Id. 332.

But this is very familiar doctrine, and authorities need not be further cited. On the merits of the case, the verdict seems to be warranted, and there are no errors in the record which affect the substantial justice of the judgment. On the facts as we understand them, there could be no other and just result.

By the COURT. The judgment of the circuit court is affirmed.

NOVATION, definition of: Note to *Hobson v. Davidson's Syndic*, 13 Am. Dec. 296; see also *Heaton v. Angier*, 7 N. H. 397; 28 Am. Dec. 353.

HEMMINGWAY v. CHICAGO, MILWAUKEE, AND ST.
PAUL RAILWAY COMPANY.

[72 WISCONSIN, 42.]

DUTY OF RAILWAY CONDUCTOR TO INFANT PASSENGER. — Where an ordinary country boy, about eleven years old, is sent on a freight train to a city seven miles from home by his mother, who previously warns him not to attempt to get off the train while it is moving, and on his arrival at the station, fearing that the train will carry him off, and that he will not be able to get back, and seeing an adult fellow-passenger, who tells him that he guesses the train will not stop at the station, get off while the train is slowly moving past the station, attempts to get off while the train is thus moving, and falls and is injured, the jury are justified in finding that the conductor was negligent in not telling him when he collected his fare and asked his name and destination that the train would first run by the station, and afterwards back down to the platform to allow the passengers to alight, or in not being himself present, or having some one else present, to prevent the boy from leaving the train at the station.

INFANT OF TENDER AGE, WHEN NOT GUILTY OF CONTRIBUTORY NEGLIGENCE. — Where an infant of tender age, under great fear and excitement, and apprehensive of being carried away and beyond his destination, attempts to get off at a railway station while the train is slowly moving past it, and in doing so falls under the train and is injured, he is not guilty of contributory negligence.

PARENT NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, WHEN. — Where danger to an infant railway passenger arises from an unaccustomed irregularity in the movement of the train, his parents are not guilty of negligence in not warning him as to such danger, the irregularity being unknown to them when they send him on the journey, especially where they do warn him against ordinary dangers, to the extent of their knowledge of them.

RES GESTÆ. — Evidence of what a fellow-passenger said to the plaintiff as to whether or not a railway train upon which they were riding was going to stop at a station, in immediate connection with the plaintiff's act in attempting to get off the train, is admissible as part of the *res gestæ*, not to charge the defendant with liability, but as explanatory of the plaintiff's motives and mental condition at the time.

FACT THAT TRAIN DID NOT STOP AT STATION may be alluded to in charging the jury, for the purpose of showing that in view of it it might be the duty of the company to instruct the plaintiff that the train would not stop at the station in the first instance, but would return to it, so as to put him on his guard against an attempt to leave the train while in motion, although the company was not bound to stop the train at the station.

THOUGH CHARGE ABSTRACTLY CONSIDERED BE NOT STRICTLY CORRECT, yet if, taken in connection with the circumstances of the case and other instructions given, it cannot have done any injury to the party, or misled the jury, it will not be ground for reversal.

ACTION for personal injuries. The opinion states the case.

John W. Cary, H. H. Field, and John T. Fesh, for the appellant.

John Winans and Ogden H. Fethers, for the respondent.

ORTON, J. This action is to recover damages for personal injuries to the plaintiff, caused by the alleged negligence of the defendant. It has been twice tried, and in both instances the plaintiff recovered, and this is its second appearance in this court. The evidence was substantially the same on both trials, and the facts are very fully stated in the report of the case on the former appeal (67 Wis. 668), and therefore need not be repeated. The negligence charged upon the defendant in the complaint is: 1. The failure of its servants in charge of the freight train on which the plaintiff was a passenger to stop the train at the depot or depot platform when it first arrived there; and 2. Their failure to explain to the plaintiff why said train passed said station without stopping, or to give him any information or notice of such fact, or in relation thereto. On the first trial, the court substantially instructed the jury that the defendant owed the plaintiff the first of said duties, but not the second. On the first appeal, this court held that the company did not owe the plaintiff the duty to stop the freight train at the platform. As to the second of said duties, and now the only one to be considered, Mr. Justice Lyon said, in the opinion: "Whether the court ruled correctly or otherwise in holding that the defendant was under no obligation to anticipate that the plaintiff would attempt to leave the train when he did, which we have seen was equivalent to ruling that it was not bound to notify the plaintiff that the train would pass the depot without stopping, is a question not properly before us on this appeal. Hence we do not determine it." On the last trial, therefore, the neglect to so inform the plaintiff was the sole ground of recovery. The negligence of the defendant in this one respect was submitted to the jury as a question of fact, with the instruction that the defendant's servants "were required to give the plaintiff such care and attention as his safety reasonably required or demanded, in view of his tender years and presumable lack of experience," and much greater care than to an adult passenger. All the general instructions excepted to relate to this duty of the defendant to the plaintiff only indirectly, as a statement of the general principles of law applicable to the age and condition of the plaintiff, and the relations

of the defendant towards him as a passenger, to aid the jury in determining the question whether the defendant was negligent in the respect above stated. Conceding that these instructions were correct, the contention of the learned counsel of the appellant is that the verdict is unsupported by the evidence.

On the first trial, the jury were instructed, as a matter of law, that the defendant was not guilty of negligence in not causing the plaintiff to be informed that the train would not stop at the platform in the first instance, or to be warned not to attempt getting off at the platform while the train was moving, or to be instructed as to the movements of the train on its arrival at Janesville; for all this was implied in the instruction that the employees of the company were not bound to anticipate that the plaintiff would or might attempt to get off at the platform while the train was moving. On the last trial, the court did not instruct the jury, as matter of law, that the defendant was negligent in this respect, but left that question to the jury as a question of fact. The facts being given or stated, negligence may be a question of law; but in this case, we choose to treat the question as the court below treated it, as one of fact for the jury; and if, in our view, the evidence warranted the verdict based upon the finding of such negligence, it ought not to be disturbed.

1. We think that the facts justified such a finding and verdict. The plaintiff was a boy ten years and ten months old,—an ordinary country boy. He resided at Hanover, about seven miles west from Janesville. He was sent to Janesville by his mother on some errand, with the caution that he must not attempt to get off the train while in motion. He went to the caboose, and got on without paying his fare or obtaining a ticket. There were two other passengers, a gentleman and lady. Soon after the train had started, the conductor came into the caboose, and found the boy sitting in a seat, and asked him his name and where he was going. The boy told him, and gave him ten cents as his fare. The conductor remained in one apartment of the caboose, without saying anything more to the boy, until the train came near the round-house, about a mile west of the station. He then left the caboose and passed over the train to the engine; and when the engine came opposite the depot, he stepped off and went into the office to register his train. When the caboose came to the platform, the gentleman who was in the caboose with

the boy went out of the car and stood on the lower step a moment, and then stepped off the car to the platform. The plaintiff also left his seat and went out of the caboose and stood on the upper step; and as the train was about to pass the platform he jumped off, or attempted to do so, but struck against the gentleman who got off before him, and fell under the wheels and was injured. It was customary for this freight train to so pass the platform without stopping, and to go on a distance beyond a switch, to allow the passenger train there waiting to pass on westwardly on the main track. Then the freight train is backed up to the platform to allow passengers to get off. There is no evidence that either the plaintiff or his parents knew of this customary movement of the freight train. The plaintiff testified that the gentleman with him said that he guessed the train would not stop; but that he should have attempted to get off there any way, as he was frightened and excited, and thought that the train would carry him off, and he would not be able to get back. None of the employees of the defendant paid any attention to the plaintiff after he had told his name and destination and paid his fare in the caboose. The plaintiff evidently supposed that the train would stop at the platform in the first place, so that he might get off. When it did not stop, he did not know when or where it might stop, and he feared that he would be carried away he knew not where; and he evidently supposed that it was necessary for him to jump off as he did, as his last chance of stopping at Janesville. All this seems perfectly natural and consistent with the age and experience of the infant plaintiff. He had been to Janesville three times before, but twice with others; and once, when alone, the caboose stopped at the platform and he got off there. To this boy plaintiff, it was unaccountable that the train did not stop at the platform. He knew no reason why it should not, and he knew of no other chance of getting off the train. It was running slowly at the time; and if he had time to think, he evidently thought that he could get off safely.

Wherein did the conductor fail in his duty to the plaintiff under these peculiar circumstances? is the question that was left to the jury; and the question on this appeal is, Wherein were the jury warranted in finding that he failed in his duty? It seems to us that he so failed at the time he asked the plaintiff his name and where he was going, and received his fare. He had no reason to suppose that the boy had ever been to

Janesville before on this freight train, or that he knew of this unusual movement of the train past the depot, and he might well have supposed that the boy would be frightened when they passed the depot without stopping, and fear that he was being carried past his destination, and he might also have supposed and anticipated that he would attempt the dangerous expedient of trying to jump off at the depot from the moving train. It would seem that if the conductor had ordinary judgment and discretion, or had been ordinarily thoughtful and prudent, he would have so supposed and anticipated. The questions he put to the plaintiff might well have suggested to him to ask him still further if he knew that the train did not stop at the depot, but would pass by some distance, and then back up so that he might get off with safety. The conductor might have cured or supplied this failure of his duty to the plaintiff by being present, or by having some one present when the plaintiff attempted to leave the train, and preventing him from doing so to his injury. He evidently thought nothing about it, and cared nothing about it. The boy plaintiff was under his care and protection, and his inexperience and helplessness appealed most strongly to that care and protection, and yet he left him without instruction or caution in such a dangerous emergency. Herein we think the jury were justified in finding such a want of ordinary care and prudence as to make the defendant liable. This disposes of the main question as to the liability of the defendant for negligence in not sufficiently caring for the plaintiff.

2. But it is contended that the negligence of the plaintiff in attempting to jump from the moving train contributed to his injury. It was the peculiar province of the jury to determine that question: *Parish v. Eden*, 62 Wis. 272; *Langhoff v. M. & P. du C. R'y Co.*, 19 Id. 489; *Curry v. C. & N. W. R'y Co.*, 43 Id. 685; *Leavitt v. C. & N. W. R'y Co.*, 64 Id. 228. As a general rule, it is negligence for an adult person to jump from a train of cars in motion. But this is not an invariable rule. A passenger may be exonerated from blame by being suddenly put into a condition of nervous excitement and alarm by the fault of the company, and who jumps from a moving train under a sudden impulse to save himself from serious inconvenience. Whether a justification exists may depend upon the speed of the train and other circumstances, or upon whether he did what careful and experienced persons generally would be likely to do under similar circumstances: Wharton on Neg-

ligence, sec. 377; *Robson v. N. E. R'y Co.*, L. R. 10 Q. B. 271; *Filer v. N. Y. C. R'y Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Johnson v. W. C. & P. R'y Co.*, 70 Pa. St. 365; *Delamatyr v. M. & P. du C. R'y Co.*, 24 Wis. 586; *Shannon v. B. & A. R'y Co.*, 78 Me. 52. In view of this exception to the general principle, the plaintiff here, being of such tender age and under such great fear and excitement, and with the apprehension that he would be carried away and beyond his destination if he did not get off at the platform, may well be exonerated from all blame. The age and infancy of the plaintiff must be considered in such a case, even if he is of such age as to be *sui juris* in respect to many other things: 2 Thompson on Negligence, 1180. What might appear to be reasonable to a person of such tender age might be most unreasonable to an adult person of more discretion, and it was for the jury to take such difference into consideration in determining the question of contributory negligence of the plaintiff: *Barry v. N. Y. C. etc. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Byrne v. N. Y. C. etc. R. R. Co.*, 83 N. Y. 620; *Birge v. Gardiner*, 19 Conn. 507; *Swoboda v. Ward*, 40 Mich. 420; *Lynch v. Smith*, 104 Mass. 57; 6 Am. Rep. 188; *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645; *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6. But these considerations are self-evident, and appeal to the common reason and understanding. The plaintiff acted in the emergency as a boy of his age would be most likely to act.

3. It is contended, also, that the parents of the plaintiff ought to have instructed their son as to the dangers of the route and how to avoid them. The mother did do so to the extent of her knowledge, by cautioning him generally not to leave the train when it was in motion. Had she known that it was customary for the train not to stop at the depot on its first arrival there, and of its other movements, it might have been her duty to have informed him of it, as it was the duty of the conductor to have done. But she did not know of such an unaccustomed irregularity in the movement of the train, or she would most probably have informed him of it.

4. It is also alleged as error that the court allowed proof of what the gentleman who preceded the plaintiff in getting off the train said to him as to whether the train would stop there. This was said in immediate connection with the plaintiff's act in attempting to get off the train, and was explanatory of his motives and mental condition at the time, and by all authority a part of the *res gestæ*: *Twomley v. C. P., N., & E. R. R.*

Co., 69 N. Y. 158; *Shannon v. B. & A. R. Co.*, 78 Me. 52; Greenl. Ev., sec. 108, note b; *Stewart v. Hanson*, 35 Me. 507; *Church v. Rowell*, 49 Id. 371; *Norwich Transp. Co. v. Flint*, 13 Wall. 3; *Cassida v. Oregon R. & Nav. Co.*, 14 Or. 551. This evidence was not admitted for the purpose of charging the defendant with liability for what this stranger said at the time, but was admitted only as a part of the *res gestæ*, and was therefore proper. The authorities cited by the appellant's counsel to this point disapprove of such evidence only because it ought not to charge the company with liability. The court in instructing the jury said to them that the company was not responsible for the statements of this stranger, and that they were admitted only "as tending to throw light on the condition of the boy's mind at the time, and to show all the circumstances which influenced his action."

5. Those parts of the charge of the court to the jury relating to the general care and protection which infant passengers ought to receive from the servants of the company as the ground of the above duty to inform this plaintiff of the peculiar and unusual movements of the freight train on its arrival at Janesville, and which were excepted to, appear to have been fair and strictly correct in the light of all authorities upon the subject.

6. That part of the charge that called the attention of the jury to the fact that the train did not stop and was not intended to stop at the platform, and excepted to because it was again submitting such fact to the jury as a failure of duty on the part of the company, which for such purpose had already been disapproved by this court, was evidently given for no such purpose. The jury were distinctly charged that such fact was not admissible to show the negligence of the company or its failure of duty. Such fact was alluded to only to show that in view of it, it might be the duty of the company to instruct the plaintiff how to act in such case, and to inform him that the train would not stop at the depot, and its subsequent movements, so as to put him on his guard against an attempt to leave the train while thus in motion. For such purpose it was clearly proper.

* 7. That part of the charge which made it incumbent upon the employees of the company "to exercise the utmost care, diligence, and foresight for the safety" of the plaintiff while under their charge, is excepted to on the ground that such a degree of care was not the rule in such a case. Abstractly

considered, it may be that this part of the charge was not strictly correct. The court, however, had just instructed the jury that the negligence of the company must be shown by a preponderance of the evidence, and accompanied the objectionable language with the explanation that the care of an infant passenger, so unattended, should be greater than that required to be used towards an adult passenger. The language used and the rule stated could have no other application than to the failure of the company to so instruct, inform, and protect the plaintiff under the peculiar circumstances of the case. That duty performed, would have been the utmost care, diligence, and foresight required under the circumstances. In this view, the rule, even if too stringent as a rule of law, could have done no harm to the defendant. The degree of care was sufficiently and correctly measured by the discharge of this one duty to the plaintiff, so that the jury could not have been misled by the abstract rule. It is very difficult, if not impossible, to find that the company or its employees neglected any other duty towards the plaintiff than such instruction, information, and warning by the conductor, or by his being present, or having some one present to prevent the plaintiff from so attempting to leave the train at the platform, and to protect him from from such hazard. The jury must have understood that this was the true measure of the defendant's care and responsibility, and must have so found, and we think that they were justified in so finding.

The case seems to have been most ably tried, and the rulings of the court seem to have been carefully considered and correctly and judiciously made. We can find no error in the rulings of the court, and on the merits of the case we would not be warranted in disturbing the verdict.

By the COURT. The judgment of the circuit court is affirmed.

DUTY OF CARRIER TO INFORM PASSENGER, WHERE THE INFORMATION WOULD TEND TO PREVENT HIS EXPOSING HIMSELF TO DANGER AND INJURY. — While carriers of passengers are required by law to exercise the highest degree of care, skill, and diligence to provide for the safety of their passengers, it is equally incumbent upon passengers to exercise reasonable care to avoid injury. A carrier has the right to assume that his passengers possess the ordinary intelligence and prudence necessary to enable them to take care of themselves under the ordinary circumstances and usual exigencies attendant upon or arising out of the particular mode of travel adopted by them: *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Wills v. Lynn etc. R. R. Co.*, 129 Mass. 351; *Mitchell v. Chicago etc. R'y*

Co., 51 Mich. 236; 47 Am. Rep. 566; *Detroit etc. R. R. Co. v. Curtis*, 23 Wis. 152; 99 Am. Dec. 141. In delivering the opinion of the court in *Indianapolis etc. R. R. Co. v. Rutherford*, *supra*, Frazer, C. J., said: "A passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the highest degree of skill and care to save the passenger from harm. Nor does the duty of the carrier extend to the imprisonment of the passenger, so as to prevent the latter, by his recklessness or folly, from voluntarily exposing himself to needless peril. Though a passenger, he is nevertheless a free man." And Campbell, J., in delivering the opinion of the court in *Mitchell v. Chicago etc. R'y Co.*, *supra*, said: "The company, as held in some of the cases above cited, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway traveling, and the company could not do business on any other basis." And in *Detroit etc. R. R. Co. v. Curtis*, *supra*, it was held that railroad companies are not required to have special agents, wearing badges, to prevent passengers from injuring themselves by negligent acts in getting on or off railroad trains; but that they have a right to assume that travelers can take care of themselves in view of the ordinary incidents of traveling upon railroads that are constructed with proper care and skill.

But the carrier is bound to warn his passengers of dangers that arise from extraordinary or unusual conditions, brought about by his acts, especially where such dangers are not known to the passengers, but are known to the carrier or to his agents or servants: *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649; 4 Am. St. Rep. 231; *Sullivan v. Vicksburg etc. R. R. Co.*, 39 La. Ann. 800; 4 Am. St. Rep. 239; *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 139; 44 Am. Rep. 419.

Where a railroad train is removed from one track to another while the passengers who came in on it are in the eating-house taking their supper, it is the duty of the company to have employees to inform the passengers, on their egress from the dining-room, of the exact location of their train, and of a safe way to reach it: *Peniston v. Chicago etc. R. R. Co.*, 34 La. Ann. 777; 44 Am. Rep. 444. Where a railroad company stops its train at a station so that one or more of its passenger-cars are left outside the station-grounds in such a position as to obstruct the light, and a passenger, finding no one to inform him how to safely reach the sleeper at the rear end of the train, endeavors to reach the sleeper by passing along the insufficiently lighted way, and falls and is injured, the company will be liable. Under such circumstances, it is the duty of the company to have necessary employees and servants present to inform and direct passengers as to the correct location of their trains, and the usual and safest way of reaching or leaving them: *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649; 4 Am. St. Rep. 231. If a railroad car in which there are passengers is brought to a standstill at a place where it is unsafe for them to alight, under circumstances which warrant the passengers in believing that it is intended that they shall get out, and that they may do so with safety, it is the duty of the company to provide assistance, or to give warning, or to move the car to a more suitable place; and its failure to do so amounts to negligence on its part: *Cockle v. London etc. R'y Co.*, L. R. 7 C. P. 321; *Praeger v. Bristol etc. R'y Co.*, 24 L. T., N. S., 105; *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168; *Cartwright v. Chicago etc. R'y Co.*, 52 Mich. 606; 50 Am. Rep. 274.

In *Carpenter v. Boston etc. R. R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540, the plaintiff, while waiting on the platform of the defendant's station for the

arrival of the train for which he had purchased a ticket, was injured by being struck by a loaded mail-bag thrown from the postal car in the approaching train. It appeared that the defendant knew of the custom of throwing off mail-bags when passengers were on the platform, and it did not appear that it had taken any precautions to prevent injury therefrom. It was held that the plaintiff was improperly nonsuited. Danforth, J., in delivering the opinion of the court, said: "The act was itself dangerous. There was, under the circumstances of which the defendant had notice, a natural and probable connection between the act of throwing out a mail-bag with its contents and the injury which actually happened. It could have been foreseen, and the defendant owed a duty to those who might probably be on the platform, either to prohibit the practice which made the place dangerous, or exclude the passenger until train-time, or provide some other way for ingress to the cars, or at least give notice to him that he must take care and avoid the danger, or in some other way use reasonable caution to prevent damage from the danger which it knew or ought to have known. Whether such reasonable care was taken by notice, guarding the way, or otherwise, must be determined as a matter of fact."

Where a railway train overshoots the station, or stops short of it, coming to a standstill after the name of the station has been called out, but before it has been brought to the place where the passengers are expected to alight, it would seem to be the duty of the company to give warning to the passengers not to get off until the train has been brought to a place where they can safely do so. At least, its failure to give such warning is evidence from which the jury may infer negligence on its part, especially in cases where the train is thus stopped in the night-time: *Praeger v. London etc. R'y Co.*, 24 L. T., N. S., 105; *Weller v. London etc. R'y Co.*, L. R. 9 Com. P. 126; 8 Moak, 441; *Memphis etc. R'y Co. v. Stringfellow*, 44 Ark. 322; 51 Am. Rep. 598; *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168; *Central R. R. Co. v. Van Horn*, 38 N. J. L. 133; *Taber v. Delaware etc. R. R. Co.*, 71 N. Y. 489; *Boss v. Providence etc. R. R. Co.*, 15 R. I. 149. Brett, J., in *Weller v. London etc. R'y Co.*, *supra*, said: "I agree that to call out the name of the station before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver has overshot the station, and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events, the jury may from the facts infer negligence." And Honyman, J., in the same case said: "But the train having overshot the platform, and the station having been called out, the omission of the company's servants to caution the passengers not to alight until the train had been brought up at the proper place was evidence of negligence. Speaking for myself, I should say it was not only evidence of negligence, but negligence itself." And Cockburn, C. J., in *Praeger v. London etc. R'y Co.*, 24 L. T., N. S., 105, said: "It was incumbent on the guard, if he intended passengers to get out, to warn them of the position of the platform. He gave no such warning, and the omission seems to me to amount to negligence." In *Taber v. Delaware etc. R. R. Co.*, 71 N. Y. 489, the plaintiff was a passenger on the defendant's road, having a ticket for W. She was not familiar with that station, but knew it was the next station to C. F., and about three fourths of a mile therefrom. The night was dark; there was no depot at W., nor station-light, nor anything to indicate the stopping-place to a person not familiar with it. She knew when the train passed C.

F., and as her evidence tended to show, after the proper interval to run the distance to W., the train came to a full stop; it had in fact run by the station. Before reaching it the brakeman announced the station; several passengers arose to leave; the plaintiff then rose from her seat near the center of the car, walked out upon the platform, took hold of the rail, stepped down one step, and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. It was held, in an action to recover damages, that it was a question for the jury, whether, in the exercise of reasonable care and prudence, the defendant should not have given notice to passengers desiring to alight at the station that the train had not come to a final stop, but would back up; and that the plaintiff was justified, under the circumstances, in supposing she had reached her destination, and in attempting to leave the car; at least, that the question of contributory negligence on her part was proper for the jury. Andrews, J., who delivered the opinion of the court in that case, said: "But the fact that the train overshot the station, rendering it necessary, after it came to a standstill, to start it back to the usual stopping-place, in connection with the other circumstances, made it a question for the jury, whether, in the exercise of reasonable care and prudence, the defendant should not have given notice to passengers desiring to alight at the station that the train had not come to a final stop, and that it would back up."

But in *Mitchell v. Chicago etc. R'y Co.*, 51 Mich. 236, 47 Am. Rep. 566, the plaintiff was traveling on the defendant's road with a ticket from Chicago to Lansing, having attached a coupon from Lansing to Fowlerville. As she would have to cross over a considerable distance from the defendant's depot at Lansing to the station on the road from Lansing to Fowlerville, the conductor of the train offered to take her to the junction where the two roads met. Just before arriving at the junction, the name of the station was called out by the proper person, and the cars came to a full stop, as required by law before reaching crossings. The plaintiff at once left her seat, and hurried to leave the car. It did not appear that any person employed on the train noticed her. She went down the steps where there was no platform or other convenience for landing, and just as she stepped off, the train started again to go forward to the depot, and she fell and broke her ankle. When the train stopped, the conductor came in to help her out, and finding she was not in the car, backed down and picked her up, and took her to Lansing for surgical treatment. It was daylight when the accident happened. The company was held not to be liable. Campbell, J., delivering the opinion, said: "The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken-supposition that the cars had stopped for the station, and that she should, therefore, get out. There was nothing at the spot to indicate a landing-place, and there was, at the proper place, a short distance farther on, a building and platform appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and, from the distance mentioned, we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril, or left her place. Nothing is shown which put them in fault for not knowing this." In the case of *Memphis etc. R'y Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598, this case is distinguished from the one under consideration by reason of the facts that the accident happened in daylight, that no invitation was given

to alight, and that the conductor, before reaching the place, notified the passenger that he would escort her to the depot of the connecting line.

In *Illinois C. R. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255, the plaintiff below was a passenger on the train of the defendant below, and being asleep at the time, was carried past his station. When the train stopped over a bridge to take water, he got up, and without any direction from any one connected with the company, stepped off the car, and was injured. It was held that he could not recover. Sheldon, J., who delivered the opinion of the court, said: "It is then insisted that the stoppage of a passenger train at such a place as the one in question, without some precaution to notify passengers of danger, was an act of gross negligence. But why notify passengers of danger? It was a stopping-place for getting water, not for passengers. The bridge was intended solely for the passage of cars, not for the alighting of passengers upon it. The place for the passenger here was inside, not outside, of the car. The train and the appellee in his proper place inside the car were as safe upon the bridge as they would have been anywhere away from it. The fact that the cars were upon the bridge involved no danger or risk to the passenger so long as he remained in his right place within the car." So where a railroad train is stopped on a dark night, merely waiting for a train from the opposite direction to pass, at a place several rods from a passenger station, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and receives a personal injury by walking into an open cattle-guard cannot recover damages of the company therefor: *Frost v. Grand Trunk R. R. Co.*, 10 Allen, 387; 87 Am. Dec. 668.

If trains are running out of time, the employees of the company are bound to be on the lookout, and give seasonable notice of any meeting of trains out of time or place, so as to guard against accidents and injury to passengers: *Gonzales v. New York etc. R. R. Co.*, 39 How. Pr. 407. Foster, J., in delivering the opinion of the court in this case, said: "It was the duty of the conductor of the accommodation train and of the engineer to know whether that train was out of time, and whether it was probable that the express train would pass the station while their train was there; and it was their duty, under the circumstances, to look out for the express train, and to signal it if it was near; and it was also their duty to see that the passengers should be prevented from leaving the train on the west side, or at least to give them notice of the approaching train, and to request them either to sit still until that train had passed, or to leave the train on the east side, and the omission to do so, of which there is no dispute, was negligence." And if a person is put in a place of peril by invitation of the servants of a railway company, the law requires them to exercise a degree of care corresponding to the danger to which they have exposed him. If they are about to make a "running switch," or do any other act fraught with special peril to him, they must advise him of the impending danger, and give him an opportunity to guard against or escape from it: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510. Shope, J., in delivering the opinion of the court in this case, said: "If the deceased, at the time of the accident, was in a place of peril, that fact was known to appellant's servants. If he was there by their invitation or direction, the law would require of them the exercise of a degree of care corresponding to the danger to which they had thus exposed him. The care ordinarily required of a carrier of passengers is to be measured by the known peril to the party it undertakes to carry. The proof shows that the making of a running switch is usually attended with

danger, and would be especially so to persons standing upon the foot-board of the engine. This was known to appellant's servants, but it is not shown to have been known by deceased. Nor is it shown that he knew or was told a running switch was to be made. It became the duty, then, of the servants of appellant to advise deceased of the facts before attempting the running switch, so that he might have taken extra precaution, or have gotten off the engine before the switch was attempted."

But if a passenger voluntarily takes an exposed position on the cars of a railway company, with no occasion therefor nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, he takes the special risks of that position upon himself: *Hickey v. Boston etc. R. R. Co.*, 14 Allen, 429. And in the case of *Kentucky C. R. R. Co. v. Thomas*, 79 Ky. 160, Cofer, C. J., delivering the opinion of the court, said: "Ordinarily it is the duty of a conductor to warn a passenger known to be occupying a dangerous position on the train, and to request him to take a seat in the passenger-car, and his failure to do so may sometimes be equivalent to the consent of the company that the passenger may occupy that position. But he is not bound, at the peril of the company, to know that a passenger is in an exposed position, and unless he does know it, the passenger has no right to complain that he was not warned." And of course, where a passenger is warned that the place he takes on a car is dangerous, and that it is against the rules of the company to be in it, and he nevertheless persists in remaining there, if he is injured the company will not be liable: *Wills v. Lynn etc. R. R. Co.*, 129 Mass. 351.

It is the duty of a railroad company, through its agents and servants, to give reasonable signals of the departure of its trains from its stations and stopping-places, and the signals given should be such as would ordinarily attract the attention of passengers and those interested in the movements of the trains: 2 Wood's Railway Law, 1134, 1156; *Andrist v. Union Pacific R'y Co.*, 30 Fed. Rep. 345; *State v. Grand Trunk R'y*, 58 Me. 176; 4 Am. Rep. 258; *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371; *Imhoff v. Chicago etc. R. R. Co.*, 22 Wis. 681. In the case of *State v. Grand Trunk R'y*, *supra*, a train of the defendant stopped on a side-track to wait for another train to pass, and the passengers got off the train without objection on the part of the railroad employees. Kent, J., who delivered the opinion of the court, said: "We think it but reasonable in such cases to require that the proper officer or servant of the corporation should give reasonable notice in time for such passengers to return to the cars, which they left, safely, by using due and proper diligence, caution, and care. But they are not bound or required to go after those who have gone away and out of sight, and out of reach of the voice, which gives the usual loud and distinct notice for all to repair on board. If there be an established signal by blowing the whistle for passengers to take their places in the cars, that should also be sounded." In *Doss v. Missouri etc. R. R. Co.*, *supra*, the plaintiff went on board the defendant's train to find seats for his sister-in-law, who was a passenger on the train, and was injured in attempting to get off the train after it had started. Napton, J., in delivering the opinion of the court, said: "If the time was not enough, or if the defendant's agents failed to give notice of the starting of the train, by the usual signals, of an oral cry of 'All aboard,' from the conductor, and the ringing of the bell by the engineer, it was not such ordinary care as the defendant was bound to exercise, both towards

passengers and persons in the situation of plaintiff. And these questions of fact were, therefore, properly submitted to the jury by the court."

In *Andrist v. Union Pacific R'y Co.*, 30 Fed. Rep. 345, an emigrant train on which the plaintiff was a passenger stopped all night at a station, and in the morning started without giving notice to the passengers, some of whom, including the plaintiff, had got off to take the fresh air. Before all the passengers had got to their places in their respective cars, the company's employees in charge of the train began to break it up, and while the plaintiff was stepping from one car to another, with a brakeman near by him, who gave him no warning, the cars were separated, and he fell and was injured. It was held that the company was negligent. Brewer, J., who delivered the opinion, said: "I do not hesitate to affirm that before a railroad company can be excused from culpable negligence in thus breaking up a passenger train which has been kept for hours at a station, it must have given ample notice, by whistle or ringing of bells, or otherwise, to all passengers of the intention to start, or in some other way seen that they had secured their respective places in the cars."

It is not the duty of a railway conductor to wake passengers on their arrival at their destination, and the company is not liable for his failure to wake a passenger, although he promised to do it: *Nunn v. Georgia R. R.*, 71 Ga. 710; 51 Am. Rep. 284; *Sevier v. Vicksburg etc. R. R. Co.*, 61 Miss. 8; 48 Am. Rep. 74; nor is he bound, when his train stops at a station, to go through it and see that every person has passed safely out of the car, or to personally notify each passenger: *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; 90 Am. Dec. 332; *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374; *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 292; 72 Am. Dec. 787. Where a person enters a railroad-car, not as a passenger, but to assist to a seat an aged and infirm relative, the company is not bound to give him any special notice of the time of the departure of the train: *Lucas v. New Bedford etc. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406. In *Eaton v. Boston etc. R. R. Co.*, 11 Allen, 500, 87 Am. Dec. 730, it was held to be a question for the jury to determine whether or not it was the duty of the defendant to notify passengers on board of a train, stopped by an obstruction on its track, of the expediency of their leaving the cars to avoid the impending danger from the approach of another train from the opposite direction, on the same track.

If a passenger is sick, unable to walk, and requires assistance to get from the car, and longer delay than usual is necessary at the station to enable him to be safely removed, he should give timely notice to the conductor: *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478.

J. S. KEATOR LUMBER COMPANY v. ST. CROIX BOOM CORPORATION.

[72 WISCONSIN, 62.]

POWER OF WISCONSIN AND MINNESOTA TO AUTHORIZE CONSTRUCTION OF BOOMS IN ST. CROIX RIVER. — The provision of the ordinance of 1787, which was substantially incorporated into the enabling acts for the admission of the states of Wisconsin and Minnesota, and into the constitutions of those states, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, . . . without any tax, impost, or duty therefor," was not intended to prevent obstructions to the navigation of such waters, but to prohibit the levying of any tax on such navigation; and until Congress sees fit to legislate on the subject, those states may authorize the construction in such waters of booms for intercepting, storing, and handling logs, although such booms may materially interfere with navigation by steamboats and other watercraft.

CONCURRENT JURISDICTION OF STATES OVER RIVER FORMING BOUNDARY BETWEEN THEM. — Wisconsin and Minnesota having, by their constitutions, concurrent jurisdiction over the St. Croix River, forming the boundary between them, either state, acting independently of the other, may, in the absence of legislation by Congress to regulate commerce on said river, authorize the construction of booms for the interception, storage, and handling of logs in said river, within its own territory; but it cannot, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portions of the river. Orton, J., dissenting.

QUESTION WHETHER ONE STATE HAS INFRINGED JURISDICTION OF ANOTHER OVER BOUNDARY RIVER, NOT AVAILABLE TO MERE PRIVATE PARTY. — If Minnesota attempts to grant a corporation authority to construct booms in the boundary river between it and Wisconsin, within the territory of the latter state, or if such corporation, under its charter, assumes such authority, mere private parties, claiming to be damaged by the obstruction thereby caused to navigation, cannot, in an action against such corporation, be heard upon the question as to whether Minnesota has infringed upon the rightful jurisdiction of Wisconsin.

BOOM CORPORATION NOT LIABLE FOR NOT GOING OUTSIDE OF ITS CHARTER POWERS. — A boom corporation, bound by its charter to use all possible means for the speedy removal of logs, is not liable for the obstruction to navigation caused by an unusual jam of logs in its boom merely because it fails to go outside of its charter powers and invade the territory of an adjoining state by taking possession of a lake there, for the purpose of keeping its booms clear.

NONSUIT IMPROPER WHEN. — Where the liability of a defendant corporation, if any, must arise out of its failure to perform duties imposed by its charter, or out of the negligent manner in which it performed those duties, and the facts and the inferences are in dispute, a nonsuit should not be granted.

ACTION brought to recover damages alleged to have been sustained by Walker, Judd, and Veazie, in the summer of

1883, by reason of a jam of saw-logs in the St. Croix River, caused by the acts and negligence of the defendant and its booming works, and which damages were transferred to the plaintiffs. It is alleged in the complaint, among other things, in effect, that Walker, Judd, and Veazie had for many years been engaged in cutting, hauling, banking, and driving down said river large quantities of saw-logs each year for the purpose of manufacturing the same into lumber at their mills at Marine, on the Minnesota side of the river, and shipping such lumber therefrom, by steamboats, or barges in tow of steamboats, and in rafts and floats, to St. Paul, and various places along the St. Croix and Mississippi rivers; that they were merchants at Marine, and transported their goods to and from that place in steamboats; that they had no other means of transportation; that they owned the steamboat G. B. Knapp; that in June, July, and August, 1883, the defendant, under its charter from Minnesota, granted February 27, 1856, and February 28, 1870, at a point below Marine, and about three miles above Stillwater, on the Minnesota side of said river, erected and maintained a boom and other obstructions in and entirely across the river, with full knowledge that the river would thereby be wholly obstructed, and would entirely cut off the navigation of boats thereon, contrary to the provisions of its charter; that the defendant had so obstructed the river in 1880, 1881, and 1882; that for the five years previous, the usual quantity of logs cut and put into said river above said boom had been from two hundred and fifty million to three hundred million feet per year; that in the spring of 1883, the defendant had reasonable cause to believe, and knew, that the quantity of logs to be received in its booms that season would be about three hundred million feet; that, June 13, 1883, the defendant's boom became crowded and jammed with logs; that the same was caused by the careless and negligent handling of said boom and the logs therein by the defendant, for the reason that the defendant had neglected, and purposely failed and refused, to make proper preparations for the receiving of said logs and the assorting of the same in such a manner as to prevent the obstruction of the navigation of the river and the channel thereof; that at that time the boom became filled with logs, and so jammed and crowded together that, commencing at a point on the Wisconsin side about three miles above Stillwater, and extending northward to a point not less than five miles above Marine, being a dis-

tance of about fifteen miles, the river and the channel thereof were filled and obstructed the entire distance mentioned, so that no part of the river between those points could be navigated by steamboats, barges, or other vessels; that the river between those points remained so obstructed, and in such a condition, that no part of it could be navigated, until August 7, 1883, being a period of fifty-five days; that said jam caused the water to set back, and damage the premises of Walker, Judd, and Veazie; that said claims for damages were sold and assigned to the plaintiffs. Numerous items of specific damages are alleged, and judgment demanded for one hundred and forty-eight thousand five hundred dollars. The answer consists largely of admissions and denials, and a justification of all it did or neglected under acts of the territory and state of Minnesota, constituting its charter and authority, to wit, the act of May 17, 1851, incorporating the St. Croix Boom Company, an act to organize the St. Croix Boom of February 27, 1856, and the several amendments and reenactments thereof, including that of February 28, 1870, whereby the defendant was incorporated and organized; and then, among other things, the answer alleges, in effect, that the St. Croix River is two hundred miles in length; that from its junction with the Mississippi, at its mouth, for a distance of one hundred and fifty miles northerly, it constitutes the boundary line between the states of Minnesota and Wisconsin; that said river has numerous tributaries flowing into it from the east and the west,—the most notable of which are named,—being twenty-three in number, all of which are lumbering streams, navigable for the transportation of logs, timber, and lumber, some of them being more than one hundred miles in length, and many having tributaries which are lumbering streams, and navigable for logs; that said river and its tributaries drain an area of country of more than twenty thousand square miles in extent; that the same is rich in pine and other timber; that the annual cut of such logs had for the past few years exceeded four hundred million feet, the separate owners, grades, and lots of which are distinguished by some seventeen hundred different marks; that such logs are floated down the rivers in the spring floods, and become intermingled in one common mass; that the St. Croix River is only navigable for Mississippi steamboats up to the city of Stillwater; that Marine is twelve miles above Stillwater; that from Stillwater to Taylor's Falls, a distance of thirty miles, the same is naviga-

ble only for boats of the smallest class used in navigable streams; that even for such boats, save in periods of high water, navigation is at all times precarious and uncertain, and at times substantially impracticable with any sort of boat; that between Stillwater and Taylor's Falls the river is narrow, shallow, abounds in sloughs, islands, sand-banks, and is tortuous, intricate, and hard to navigate; that the navigation thereon is very inconsiderable, and for the last five years had been almost entirely confined to a single boat, running regularly between those points; that, under its charter, it was the duty of the defendant to collect, take charge of, sort, separate, and raft, at its boom, all logs, timber, and lumber coming down the river to that point; that the foot of its boom was about one mile above Stillwater, and extended up to Titcomb's Landing, which is about five miles above Stillwater and six miles below Marine; that in the construction and maintenance of said boom, the defendant had employed the highest degree of skill and labor, and adopted the most approved plan for a boom at that point, and operated the same with the highest skill and diligence, and as required by its charter; that it nowhere extended entirely across the river, or interfered with the navigation thereof; that the upper boom mentioned in the charter had, many years before, been abandoned; that from the head of the lake down for about three miles were fixed a large number of booms owned by private parties, for the holding of logs; that the log-jam of June, 1883, resulted from an unusual rise in the St. Croix and all its tributaries, occurring nearly simultaneously, whereby nearly **all the logs therein** were driven down said several streams by **the owners thereof**, including Walker, Judd, and Veazie, with **the greatest rapidity**, and without any fault or agency of the defendant, and the same resulted in filling the river from the head of the defendant's boom upwards for a distance of several miles above Marine; that there was no other closing up of said river during that year; that, during the time, the river was so full of logs from the head of the defendant's boom up the stream that the same could not be navigated by steamboats, but that, during all of that period and that season, a convenient and feasible channel was kept open for steamboats, barges, and general purposes from the foot of the defendant's boom to the head thereof.

The following portions of the defendant's charter are necessary to an understanding of the opinion:—

"Sec. 11. The said St. Croix Boom Corporation are hereby authorized and empowered to construct, and shall construct, maintain, and keep in good order and repair, as provided herein, two good, substantial booms upon the River St. Croix: one at such points between the head of Cedar Bend, so called, and Rock Island, as they may select, to be known and designated as the upper boom; the other at such points between the head of Lake St. Croix and Titcomb's Landing, so called, as they may select, to be known and designated as the lower boom. And said corporation may further construct, maintain, and keep, between Titcomb's Landing and the landing at Marine Mills, such additional booms as they may deem necessary or convenient for the purpose of holding, controlling, or securing any logs or timber that may float or be driven down the St. Croix River and its tributaries, and may intercept, stop, and take exclusive possession of any such logs or timber, and secure the same within any of their said booms, whenever said corporation shall deem it prudent or necessary so to do, in which case it shall be the duty of said corporation to drive said logs or timber from said last-named additional booms to and within the limits of said lower boom as soon as practicable, at their own expense. All logs or timber floating or driven down the said River St. Croix shall be collected by said corporation in said boom, and shall be assorted according to their several marks, and well rafted in good rigging, and delivered at or near the foot of said lower boom to the owner of such logs or timber, or to such person as such owner may designate; provided, that hereafter said corporation may, at their option, omit to maintain or keep up, or raft logs or timber at, their said upper boom; and in case and so long as said upper boom is not kept up, except for the purpose of rafting logs or timber for mill-owners to be manufactured here between said booms, as hereinafter provided, it shall be the duty of log-owners to drive all of their logs or timber within the limits of said lower boom, which said corporation do not intercept and boom before the same reach the said lower boom, as provided aforesaid. . . .

"Sec. 12. All logs or timber floating or driven down the said St. Croix River shall, for the purposes contemplated in this act, be deemed to be in possession and subject to the control and direction of said corporation whenever the said logs or timber pass below the landing at Marine Mills, and said corporation shall collect and carefully sort and raft in rigging

according to their several marks, rafting each mark separately, all logs or timber which may come within the limits of said lower boom, and safely secure the same at or near the foot of said boom, in such manner that said rafts may be taken possession of and removed by the owners thereof without hindrance or inconvenience. . . .

"Sec. 13. . . . They shall employ all the men and furnish all the material necessary to raft and deliver logs, and use all reasonable exertion to effect such delivery as soon as possible, and shall, when practicable, notify the owner of any logs ready for delivery, or his agent, of the time when such logs must be removed. The owner of logs or timber rafted and ready for delivery as provided herein shall receive and take away the same within thirty-six hours from the time such logs or timber is so made ready for delivery. Whenever any unreasonable delay in delivering logs or timber, as provided herein, shall be caused by the neglect of said corporation to employ sufficient men, or to furnish necessary material, or tools to raft and deliver such logs or timber, or if such delay shall be caused by any defect in the construction of said boom, or by any failure to keep the same in good repair, or from any cause within the power of said corporation to prevent or remove, then, in such case, said corporation shall be liable to the owner of such logs or timber so detained or delayed for the damages caused by such delay; provided, said corporation shall not be liable for any delay in rafting or delivering logs or timber caused by low water, or by an unusual or extraordinary press or jam of logs or timber within the limits of their said boom, if such corporation shall use all reasonable and timely efforts to prevent or shorten the period of such delay; and for the damage caused by any failure or neglect to comply with any of the provisions of this act, the said corporation shall be liable to any person sustaining damage thereby, and such damage may be collected by action in any court of competent jurisdiction. . . .

• "Sec. 16. Whenever, in the due and vigilant exercise of all the powers and privileges conferred by its charter, logs or other timber shall enter its booms faster than the same can reasonably be rafted by the said corporation without obstruction to the channel as herein provided, or shall without fault or negligence of the corporation, using due and proper care and diligence, pass through or out of the said boom, the corporation is hereby authorized and required to pick up and col-

lect all such logs in booms of convenient size, substantially constructed. . . .

"Sec. 18. The said corporation shall always and at all times give free passage to all rafts, steamboats, keel-boats, or other water-craft navigating the said River St. Croix, without any hindrance or delay by reason of said booms, or the logs therein confined; and shall, whenever from unusual press or jam of logs or other cause the channel of said river shall become so obstructed that the craft aforesaid cannot pass through, use all possible efforts, and the most efficient and speediest means, to remove such obstruction and allow such water-craft to pass through without unnecessary delay; and should any rafts or parts of rafts of logs or other timber or lumber float into said booms, the corporation shall deliver the same without delay, for such reasonable compensation as shall indemnify the said corporation for so delivering the same.

"Sec. 19. Said corporation or its agents shall have the right at any time to enter any boom or slough between said upper and lower booms, for the purpose of taking therefrom any logs or timber that by this act the said corporation are required to drive to the said lower boom. . . .

"Sec. 21. The said corporation shall have the right to enter upon and occupy any land that may be necessary for properly conducting their business as herein required; and in case of so entering upon or occupying lands, if any person or persons shall suffer loss or damage thereby, the corporation shall make just compensation therefor," as therein provided.

At the conclusion of the testimony, the court granted the defendant's motion for a nonsuit, and the plaintiffs appealed.

Fayette Marsh and John W. Bashford, for the appellants.

R. H. Start and J. N. Castle, for the respondent.

CASSODAY, J. The general description of the St. Croix River, as given in the answer and above stated, seems to be verified to some extent by the map. The lower end or widened part of the river is known as Lake St. Croix. The city of Stillwater is situated near the upper end of this lake, on the Minnesota side, and is some thirty miles above where the lake empties into the Mississippi. It is conceded that no part of the upper boom mentioned in the eleventh section of the charter printed above, located between the head of Cedar Bend, eighteen miles above Stillwater, and a place called Rock Island,

about ten miles farther up the river, and near Taylor's Falls, was maintained at the time of this log-jam, in 1883, but that the same had long before been wholly abandoned, as authorized by that section of the charter. The defendant concedes, however, that the lower boom therein mentioned had long previously been constructed, and was maintained at the time of the jam; that the foot of it was about one mile above Stillwater, and extended up to Titcomb's Landing, about five miles above Stillwater. It is, moreover, conceded that the defendant had previously, as authorized by the section, constructed, and at the time of the jam was maintaining, certain additional booms between Titcomb's Landing and Marine Mills, about twelve miles above Stillwater, for the purpose of holding, controlling, and securing such logs and timber as might float or be driven down the St. Croix and its tributaries. The foot of such lower boom started near the Minnesota shore. Then, after proceeding up the river about half a mile, it came to the foot of a line of bars or islands in the river, one above another, along which it followed, gradually nearing the Wisconsin shore, with an outside boom, so called, in the Wisconsin channel, until it struck Four Mile Island, and from thence it continued a mile or more farther up to the upper "trip" at Titcomb's Landing. For the most of that distance such piling and booms were near the Wisconsin shore, with an occasional "trip," or "gap," through which logs or boats might pass to and from the main channel, which was mostly on the Minnesota side of the river, to what was called the "canal," on the Wisconsin side of the river. On the Minnesota side of the river, and opposite the head of Four Mile Island, was a short boom at the head of Lyman's Slough, which had a corresponding bar or island running down the river about a mile. Between Four Mile Island and Titcomb's Landing was Revior's Island, about half a mile in length, with a narrow slough of the same name between it and the Minnesota shore. About half a mile above Titcomb's Landing was a "cut-off," on the Wisconsin shore, leading around into one of the outlets of Apple River and Rice Lake, and thence into the canal mentioned at the upper "trip." This cut-off, however, was only used in extremely high water. From the head of this cut-off there ran along up the Wisconsin shore the defendant's piling and booms to the entrance of Kelley's Slough, opposite the foot of Arcola Island, being a distance of about a mile. That slough ran into one of the outlets of Rice Lake and Apple

River, and thence into the main channel. Just above the head of the cut-off, and in about the middle of the river, was Trask's Island, about half a mile in length, with the defendant's piling and booms on the lower east half of it and the upper west half of it. From the head of Trask's Island there was a line of the defendant's piling and booms running up near the middle of the river, a distance of nearly half a mile, to the foot of Arcola Island, and thence for a short distance along the east side of it. That island was narrow, about a quarter of a mile in length, and divided the main channel of the river. Opposite the head of that island, and on the Minnesota shore, was the mouth of Page's Slough,—a crooked channel of variable width, and about three or three and a half miles in length, and fed from the main channel. From the head of Arcola Island, up the main channel, to the head of Page's Slough, was about two and a half or three miles. On the east of that section of the river, and from six to ten hundred feet from it, was Rice Lake, fed from the river near Marine Mills by a narrow and shallow slough. At some places the distance between Page's Slough and the main channel was over half a mile. In the spaces between them were Mud Lake and Butler Lake. From the head of Page's Slough to Marine Mills was about a mile. There is evidence tending to show that the defendant's piling extended from the head of Arcola Island to the land between the main channel and Page's Slough; also at the head of Page's Slough.

It is manifest from the charter that the defendant's booms below Titcomb's Landing were for the purposes of storing, assorting, and delivering logs and timber to the respective owners, designated by marks, of which there appear to have been several hundred; while the several additional booms above Titcomb's Landing were for the purpose of holding, controlling, securing, and guiding such logs into such lower booms. It appears from the evidence that, during the season of 1882, commencing May 10, 1882, and finishing September 7, 1882, the defendant ran through and turned out of its booms, near the foot thereof, logs sufficient to make 272,418,460 feet; that of that amount only about 27,500,000 were so turned out prior to June; that on some days it so turned out over 6,000,000 feet. During the season of 1883, commencing April 25, 1883, and ending August 22, 1883, it ran through and turned out of its booms, near the foot thereof, logs sufficient to make 271,374,690 feet, of which over 44,000,000 were so turned out

prior to June; that on some days it turned out nearly 5,000,000 feet.

It appears from the evidence that some time in the early part of June, 1883, the defendant's booms below Titcomb's Landing became filled with logs, containing some seventy or eighty million feet; that the logs continued to come down the river faster than they were sorted and turned out at the foot of the booms; that in the fore part of June the boom from the head of Trask's Island to the foot of Arcola Island was substantially closed; that when the logs had filled the channel east of Arcola Island to the head thereof, and about June 11, 1883, a rope boom was put across to the western shore of the main channel from the head of that island, and thus very largely stopping the passage of logs below; that thereupon the steamboat and barges of Walker, Judd, and Veazie, and other water-craft, which had previously passed up and down the main channel above Arcola Island, continued their navigation, through Page's Slough, to about June 16, 1883, and until the head of the jam in the main channel above Arcola Island had reached a point above the head of Page's Slough, when all navigation ceased until on or about August 7, 1883. During that time, Walker, Judd, and Veazie transferred from their mills at Marine to their boats at Page's Slough eight hundred and forty thousand feet of their lumber. The head of the jam continued to move up the river until it reached a point some distance above Vassa, which is four miles above Marine Mills. It is estimated that there were in the jam from one hundred and twenty-five to one hundred and eighty million feet. Walker, Judd, and Veazie had about seventeen million feet in the jam, of which a drive of about seven million reached the head of the jam when it was at Marine Mills, and the other ten million when the head of the jam was near Vassa, about ten days afterwards. From June 1st to the 10th the average output from the defendant's booms, at the foot thereof, was 2,608,250 feet per day, and for the balance of that month 3,260,800 feet per day; and such daily output was greatly increased for the month of July. The average daily output from the defendant's booms in May and June, 1884, was considerably larger than in 1883. There was evidence tending to show that Mud and Butler lakes, connected with Page's Slough, could be improved so as to store several million feet of logs, especially during a high stage of water, and that the same

was true respecting Rice Lake. Such is the general nature of the evidence upon which the court granted a nonsuit.

The *gravamen* of the complaint is, that the defendant, assuming to proceed under its charter, had wholly obstructed the navigation of the river, without authority of law, and in violation of the provisions of its charter, and for its failure and refusal to make proper preparations for receiving and assorting logs, and its careless and negligent handling of such logs and its booms. The use of rivers and smaller streams for the floatage of logs is essential to the continued prosperity of the immense lumber and industrial interests of Northern Wisconsin. The regulation and preservation of such use, in connection with and as facilitating navigation by reasonable and proper booms and other structures, has long been the legislative policy of this state, as frequently sanctioned by this court. It is true the constitution of the state declares that "the River Mississippi, and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor": Sec. 1, art. 9. This provision is taken almost literally from the fourth of the "articles of compact" contained in the ordinance of 1787, and section 3 of the enabling act for the admission of the state. In speaking of it in *Wisconsin R. Imp. Co. v. Manson*, 43 Wis. 261 et seq., the present chief justice said: "Though the language of the constitution is general, it must receive a reasonable construction. It would be most unreasonable to say that it prohibited the state from granting power to a corporation or individual to make a canal or railroad through or across the 'carrying places,' or to construct works in a stream, at a point where its waters were unnavigable, for improving the navigation, and to charge a reasonable toll as a compensation for the benefit of such improvements." It is then said that the object of this provision "was to prevent the imposition of any tax, impost, or duty for the use of the streams and carrying places in their natural state. The constitution relates to navigable waters only. It does not deprive the legislature of the power, through the instrumentality of corporations or individuals, to connect unnavigable waters by canals or other means, or to render navigable places in them not navigable by nature, and to charge tolls in such cases for the use of the waters made navigable by such improvements. It is evident that waters

may be partially navigable only, either as to time or mode of navigation; and the constitution does not deprive the legislature of the power of making such improvements as increase the navigability of partially navigable waters, either in point of time or mode of navigation, and to charge tolls for the use of waters whose navigability is so increased by such improvements. This, we think, is the true construction of the constitution." The objection to such improvement company taking possession of "the entire channel of the river" is then answered in these words: "It is said that any improvement authorized should require the river to be left in substantially its former state, so as to give the public the option to use the improvement and pay the toll, or the free natural channel. We do not feel the force of this position. . . . The legislature is, primarily at least, the judge of the necessity of the improvement; and when it delegates the power to a corporation, and the state does not question that the improvement made by the corporation is in conformity with the delegated power, it seems to us that neither the necessity nor usefulness of the improvement, nor the manner in which it is made, can be called in question by private parties. Large discretion was given the plaintiff as to the mode of executing the work, and presumably it has exercised the power conferred wisely. The case involves no question of foreign or interstate commerce, or of the paramount authority of Congress over the public navigable waters of the United States. . . . Until Congress exercises its power over the subject, the improvement legalized by the state cannot be called in question by private parties." In support of these propositions, the opinion cites *Pound v. Turck*, 95 U. S. 459.

These several propositions are in harmony with subsequent adjudications in this court: *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295; 46 Id. 237; *Cohn v. Wausau Boom Co.*, 47 Id. 314; *Borchardt v. Wausau Boom Co.*, 54 Id. 107; 41 Am. Rep. 12; *Black River F. D. Ass'n v. Ketchum*, 54 Wis. 313; *Black River Imp. Co. v. La Crosse B. & T. Co.*, 54 Id. 659; *Edwards v. Wausau Boom Co.*, 67 Id. 463. The same propositions are also sanctioned by numerous cases in the supreme court of the United States in addition to *Pound v. Turck*, *supra*: See *Withers v. Buckley*, 20 How. 84; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Huse v. Glover*, 119 Id. 543; *Ouachita Packet Co. v. Aiken*, 121 Id. 444; *Sands v. Manistee R. Imp. Co.*, 123 Id. 288. In *Cohn v. Wausau Boom Co.*, 47 Wis. 322, it was said by

Ryan, C. J., that "it is settled in this state that a riparian owner on navigable water may construct, in front of his land, in shoal water, proper wharves, piers, and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water. This is properly a riparian right, resting on title to the bank, and not upon title to the soil under the water. It is a private right, however, resting, in the absence of prohibition, upon a passive or implied license by the public, is subordinate to the public use, and may be regulated or prohibited by law." Then, after construing the company's charter as giving the exclusive right of constructing booms for holding, storing, and assorting logs for a certain distance up and down the river, and works in the water in aid thereof, but without authorizing the use of any of the river's banks owned by other parties, it was, in effect, held that, as the chief value of the river was for the floatage of logs to market, and such booms were necessary therefor, and as the company's charter gave an equal right in the use of such works to all the world, the defendant should be held to be a *quasi* public corporation, with franchises for a public use, and that the prohibition of other riparian owners on the same river, within such limits, from constructing other booms therein, was a valid exercise of a paramount public right: *Id.*

Among the authorities cited in the opinion in support of such exclusive right is *Pound v. Turck, supra*. That was an action in the circuit court of the United States for damages in the delay of a raft of lumber, etc., by reason of booms, piers, and dams constructed entirely across the Chippewa River by legislative authority from this state, and in such a manner as to constitute material obstructions to the navigation of the same by any species of water-craft. The judgment of the trial court was reversed because that court had charged the jury, in effect, "that if the structures of the defendants were a material obstruction to the general navigation of the river, the statute of the state afforded them no defense, though they were built in strict conformity to its provisions": *Pound v. Turck, supra*. This was, in effect, put upon the ground that conceding that the Chippewa, though small, was a navigable river and protected by the commercial clause of the constitution of the United States, yet that it was not of such a nature as to give Congress exclusive jurisdiction, and, until Congress should intervene by appropriate legislation, the matter of navigation was subject to the control of the legislature of the

state. In support of this position, the opinion cites adjudications of that court sanctioning the validity of state legislation authorizing dams and bridges across navigable streams in a manner to wholly or partially obstruct navigation: *Willson v. Black Bird C. M. Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713.

The decision of *Pound v. Turck*, *supra*, has frequently been approved by the supreme court of the United States: *Escanaba Co. v. Chicago*, 107 U. S. 686; *Cardwell v. American Bridge Co.*, 113 Id. 210, 211; *Willamette Iron Bridge Co. v. Hatch*, 125 Id. 8. In *Cardwell v. American Bridge Co.*, *supra*, Mr. Justice Field, construing the act admitting California into the Union, and guaranteeing the free navigation of its waters as public highways substantially in the language of our state constitution above quoted, said: "The act enabling the people of Wisconsin territory to form a constitution, and for admission into the Union, contains a similar clause. And yet in *Pound v. Turck*, . . . it was held that a statute of that state which authorized the erection of a dam across a navigable river within her limits was not unconstitutional, in the absence of other legislation by Congress bearing on the case. The court does not seem to have considered the question as affected by the clause in the enabling act. That clause is not, it is true, commented on in the opinion; but the section containing it is referred to, and the declaration that navigable streams within the state are to be common highways must have been in the mind of the court. . . . The clause, therefore, in the act admitting California, . . . must be considered, according to these decisions, as in no way impairing the power which the state could exercise over the subject if the clause had no existence." He then, in effect, construes the clause as insuring "a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation."

In the more recent case of *Hamilton v. Vicksburg etc. R. R. Co.*, 119 U. S. 280, the company was chartered by the state of Louisiana to build its railroad from a point opposite Vicksburg to the Texas line. In doing so, it constructed a bridge, with a draw, over the Bouff River, which was navigated by the plaintiff's steamer, for about six months each year, from a point several miles above to the Mississippi River. The decay of the bridge necessitated a reconstruction,

which was done at a time least likely to interfere with such navigation. By reason of unexpected rains, the river became navigable for such steamer earlier than usual; but by reason of temporary obstruction, necessitated by building the bridge, the same was wholly prevented for six weeks, and the action was brought to recover damages therefor. The company justified under such state legislation, and on the ground that its action was necessary, and performed with reasonable care. The plaintiff claimed that such state legislation was void by reason of the clause in the enabling act and act for the admission of Louisiana, guaranteeing the free navigation of such river substantially like that quoted from our state constitution. The state court held that the obstruction, under the circumstances, was *damnum absque injuria*, and, following the cases cited, such judgment was affirmed by the supreme court of the United States on writ of error. Among other things, Mr. Justice Field, speaking for the whole court, said: "Until Congress intervenes in such cases, and exercises its authority, the power of the states is plenary." Then, after stating that no specific directions as to the form and character of such bridges were prescribed in the charter, he said: "The authority of the company to construct them was only an implied one, from the fact that such structures were essential to the continuous connection of the line. Two conditions, however, must be deemed to be embraced within this implied power; one, that the bridges should be so constructed as to insure safety to the crossing of the trains, and be so kept at all times; and the other, that they should not interfere unnecessarily with the navigation of the streams."

In the very recent case of *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 9 et seq., Mr. Justice Bradley, speaking for the whole court as to the construction to be given to substantially the same clause here involved, said: "In admitting some of the new states, however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether the state was carved out of the territory northwest of the Ohio or not; and it has been supposed that, in this new form of enactment, it might be regarded as a regulation of commerce which Congress has the right to impose. . . . Conceding this to be the correct view, the question then arises, What is its fair construction? What regulation of commerce does it affect? Does it prohibit physical obstructions and impediments to the navigation of the streams, or

does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other states the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction. It is obvious that, if the clause in question does prohibit physical obstructions and impediments in navigable waters, the state legislature itself, in a state where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of Congress. But it is well settled that the legislatures of such states do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original states, in reference to which no such clause exists." In support of such positions he cites the cases above mentioned, and adds: "It is clear, therefore, that, according to the construction given by this court to the clause in the act of Congress relied upon by the court below, it does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce. It is to be remembered that, in its original form [as in our state constitution], the clause embraced carrying places between the rivers, as well as the rivers themselves; and it cannot be supposed that those carrying places were intended to be always kept up as such." He then indicates that some of those places are now covered by populous towns or otherwise occupied, and that the clause there in question did not establish the police power of the United States over the rivers of Oregon.

The supreme court of Minnesota, under a constitutional provision like our own, has reached the same conclusion; and, in support of it, cites *Pound v. Turck*, *supra*, the decisions from this state above mentioned, and also cases from Michigan: *Osborne v. Knife Falls Boom Corp.*, 32 Minn. 412. The same was held in *Craig v. Kline*, 65 Pa. St. 399, 3 Am. Rep. 636, notwithstanding the existing agreement between Maryland and Pennsylvania for the preservation of the free and public navigation of the Susquehanna River: *Duluth Lumber Co. v. St. Louis Boom & Imp. Co.*, 17 Fed. Rep. 419.

Obviously, the conclusions thus reached are in conflict with some things said by my brother Taylor, in *Sweeney v. C. M. & St. P. R. Co.*, 60 Wis. 67 et seq., as to obstructions in navigable rivers which the legislature could not authorize, should they make the attempt; but the question thus suggested was not

there involved, and the absolute right of authorizing the permanent obstruction of such rivers is not here involved. The right to authorize booms for the interception, storage, and handling of logs in a manner to materially interfere with the navigation by steamboats and other water-craft, however, is involved, and such right is not only sanctioned by the supreme court of the United States, but by numerous adjudications of this court.

2. The obstructions here complained of were in that part of the St. Croix River constituting the boundary line between this state and Minnesota. The defendant justifies under corporate authority derived solely from Minnesota. We are here confronted with the question whether such authority, so granted by that state alone and without the concurrence of this, is of any validity. Our constitution declares that "the state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed and bounded by the same": Const. Wis., sec. 1, art. 9. This provision is substantially the same as the third section of the act of Congress of August 6, 1846, enabling the organization of this state preparatory to its admission into the Union. Substantially the same provision, as applied to Minnesota, is found in section 2 of article 2 of the constitution of that state, which is in substance the same as section 2 of the enabling act for the organization of that state, passed by Congress in 1857. Such "concurrent jurisdiction," therefore, is fairly established by the combined action of the general government and each of these two states. Its significance is the important inquiry presented. No one will deny that the one state has as much jurisdiction over the commerce of the river as the other, nor that the jurisdiction of each and both must be and remain subordinate to any action of Congress, under the commercial clause of our national constitution. The question recurs, whether one of these states, without the concurrence of the other, can legally grant the booming privileges and rights authorized by the defendant's charter.

The gravity of the question cannot well be overestimated. The commerce of the Northwest is rapidly increasing. Perhaps over five hundred miles of the boundary line of this state is made up of navigable rivers. Jurisdiction claimed under the authority of the one state to-day may be asserted

under the authority of the other to-morrow. Jurisdiction denied in the one state this year may be assumed by the same state next year. It is important to the people of this state, as well as such adjoining states, therefore, that the question suggested should be carefully considered, and then determined in strict accordance with the established law, and, as far as may be, in harmony with the decisions of the supreme court of the United States, which are, of course, binding on all questions of interstate commerce. But we are referred to no case in that court, and we find none, covering the precise question here presented. We do find, however, numerous adjudications in that court involving the right of one state to interfere with the navigation of the waters of a river constituting the boundary line between it and another state. Some of these cases may be instructive here.

It seems to be well settled in that court, as well as others, that the shores of navigable waters, and the soils under them, were not granted to the United States, but were, with the right of eminent domain over them for all municipal purposes, reserved to the states, respectively; and this applies to the new states as well as the original states: *Pollard's Lessee v. Hagan*, 3 How. 230; *Gilman v. Philadelphia*, 3 Wall. 726; *Stockton v. B. & N. Y. R. Co.*, 32 Fed. Rep. 9.

Among the cases demanding consideration is *Pennsylvania v. Wheeling & B. Bridge Co.*, 9 How. 647, 13 Id. 518, and 18 Id. 421. The free navigation of the Ohio River had been secured to all by the compact in the ordinance of 1787, and the action of Virginia, from which the Northwest Territory was acquired. The same was reaffirmed, upon the admission of Kentucky, by compact between that state, Virginia, and the United States. It appears that Virginia and Ohio favored the construction of such bridge, while Pennsylvania opposed it, in consequence of its then prospective interference with the interstate commerce of that state upon the river, in connection with its canals and railroads. For a time, Congress refused to take any direct action in the matter. In 1847 the state of Virginia authorized its construction. A state being complainant, the supreme court of the United States took original jurisdiction of the suit to restrain the construction of the bridge, and to abate the same. Upon the hearing, the majority of the court concluded that the construction of the bridge on the plan proposed would interfere with such commerce, and it was therefore decreed that the complainant be entitled to such

injunction and abatement, unless the plans should be changed as indicated therein, so as to obviate such interference, in which event the company were at liberty to complete the bridge: *State v. Wheeling etc. B. Co.*, 13 How. 578, 612, 622-627. This was necessarily on the theory that Virginia had power and jurisdiction to authorize such structure, provided it did so in a way not to intrude upon the power exclusively vested in Congress by the commercial clause of the constitution. After that decree had been entered, and August 31, 1852, Congress passed an act declaring the bridge to be a lawful structure as then constructed, and requiring all vessels and boats navigating the river to regulate their height accordingly: *State v. Wheeling etc. B. Co.*, 18 How. 421, 429. That act was held to be constitutional, and not invalid by reason of such compact: *Id.* In that case it was said, in the prevailing opinion of the court on the last hearing, that "the bridge had been constructed under an act of the legislature of the state of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce": *Id.* 430. This language has received recent sanction from the same court: *Bridge Co. v. United States*, 105 U. S. 480, 493, 494, 497; *Willamette Iron Bridge Co. v. Hatch*, 125 *Id.* 15. It must be conceded, however, that the power and jurisdiction of Virginia over the half of the river most distant from it was greater than it otherwise would have been, by reason of the terms and conditions upon which it parted with its title to the territory northwest of the Ohio: *Handly's Lessee v. Anthony*, 5 Wheat. 374; *Howard v. Ingersoll*, 13 How. 381; *Alabama v. Georgia*, 23 *Id.* 505.

In *Bridge Co. v. United States*, *supra*, Kentucky and Ohio each chartered and authorized a company to build a bridge over the river at Cincinnati, and the same was built by a consolidation of the two companies.

In *Mississippi and Missouri R. R. Co. v. Ward*, 2 Black, 485, Ward, as owner and navigator of steamboats from St. Paul to St. Louis, filed a bill in equity in the United States court for Iowa, for the abatement of the company's bridge across the Mississippi at Rock Island. The river at that point was 1,410 feet wide, and the bridge 1,570 feet long, with six piers, three of which were on the Iowa side. The draw-pier was the fourth from the Iowa shore, and was 386 feet long and 45 feet wide. The draw-space on the Iowa side was 111 feet, and on the Illi-

nois side 116 feet in the clear. The Illinois draw-passage was directly over the deepest channel of the river, and directly over the usual track of steamboats before the building of the bridge. That draw-passage of 116 feet, the 45 feet of the draw-pier, and 80 feet between it and the eastern line of Iowa, which was the middle of the river, covered a space of 241 feet of water-way, and embraced the main channel where steamboats had at all times navigated prior to the bridge. It was at the draw-pier, and in the Illinois draw-space, that the complainant's boats sustained the injury which was the foundation of the action. The trial court ordered the removal of the three spans and piers on the Iowa side. That decree was reversed on appeal, and the complaint dismissed. In doing so, it was held in effect that the piers and the portions of the bridge on the Illinois side were, at most, an offense against the laws of Illinois, of which neither the trial court nor the state court of Iowa had jurisdiction; that inasmuch as the removal of the three spans and piers on the Iowa side would destroy the bridge without materially improving the navigation of the river, it did not call for equitable interference, and hence was improperly ordered; that the public were not entitled to the free navigation of the whole river from bank to bank, as that would prevent the building of any lawful bridge whatever, but only a free and unobstructed navigable channel of the river. The bridge appears to have been built under corporate authority granted by Illinois, with the sanction or permission of Iowa. It should be observed that section 2 of the enabling act for Illinois conferred upon that state "concurrent jurisdiction on the Mississippi River with any state or states to be formed west thereof, so far as said river" should "form a common boundary to both"; but we find no similar clause relating to Iowa in its constitution or otherwise.

The supreme court of the United States has, in effect, frequently held that where two states are divided by a navigable river, one of them alone may, in the absence of congressional regulation, legally authorize the construction of wharves, piers, and other structures on its side of the river in aid of navigation, and the exaction of pay for the use of the same from those navigating such river: *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 Id. 423; *Vicksburg v. Tobin*, 100 Id. 430; *Packet Co. v. Catlettsburg*, 105 Id. 559; *Transportation Co. v. Parkersburg*, 107 Id. 698-701. Such exaction, however, must be confined to a reasonable compensation for such use,

but cannot be legally imposed as a tax or burden upon interstate commerce: *Id.*; *Guy v. Baltimore*, 100 Id. 434; *Transportation Co. v. Parkersburg*, *supra*. The distinction was, perhaps, first aptly stated by Mr. Justice Curtis in these words: "The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. . . . Now, the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every part, and some like the subject now in question [pilotage], as imperatively demanding that diversity which alone can meet the local necessities of navigation. . . . Whatever subjects of this power are in their nature national may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain": *Cooley v. Board of Wardens*, 12 How. 318, 319. This distinction has since been frequently sanctioned, and has been applied to wharfage on such dividing rivers: *Transportation Co. v. Parkersburg*, 107 U. S. 701-704; *County of Mobile v. Kimball*, 102 Id. 701. In *Atlee v. Packet Co.*, 21 Wall. 389, the pier against which the company's barge struck constituted a part of the riparian owner's boom to retain logs for his mill, and the same was located 140 feet from the shore, and in water of the average depth of twelve feet, and was constructed without any legislative authority whatever; and hence the case is distinguishable.

So it has been settled by the same court that one of two states separated by a navigable river may, in the exercise of its police power, grant exclusive authority to one of its citizens, as against others, to run a ferry across such river, and the exaction of fare for its use, without infringing the commercial clause of the federal constitution, and without the sanction of such other state: *Conway v. Taylor's Ex'r*, 1 Black, 603; *Fanning v. Gregoire*, 16 How. 524; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co. v. Pennsylvania*, 114 Id. 196; Gould on Waters, sec. 35. Of course, this would be subject to the exercise of a similar power by such other state: *Id.* In *Conway v. Taylor's Ex'r*, it was said

by the court: "It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both states is necessary to give it validity. . . . The concurrent action of the two states was not necessary": 1 Black, 629. "The franchise is confined to the transit from the shore of the state. The same rights which she [Kentucky] claims for herself, she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints by any of those states. It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters": *Id.* 631.

The defendant was authorized, by its charter, to construct its booms upon the St. Croix River, and for that purpose, to enter upon and occupy any land necessary for properly conducting its business: Secs. 11, 21, *supra*. It does not in terms give such authority upon the lands or waters of Wisconsin. Since the charter was granted by Minnesota alone, the defendant's authority to so enter upon and occupy would seem to be confined to the territory of Minnesota, and in no event to reach beyond its jurisdiction. The line between the two states, at the points in question, is "the main channel of" the St. Croix: Wis. Const., sec. 1, art. 2; Minn. Const., sec. 1, art. 2. The defendant was required by its charter at all times to "give free passage to all rafts, steamboats, keel-boats, or other watercraft navigating the said River St. Croix, without any hindrance or delay by reason of said booms or the logs therein confined," unless it was impossible to prevent such obstruction by reason of an unusual press or jam of logs: Sec. 18. The authority of Minnesota alone to grant such a charter seems to be fairly deducible from the several adjudications cited, unless she is deprived of doing so by that clause of her constitution and ours, and the enabling acts mentioned, securing to each state "concurrent jurisdiction" on that river.

3. Are the words "concurrent jurisdiction," as thus used, to be construed as requiring the joint action of both states to give validity to such a charter, or could Minnesota do so alone, with the corresponding right in Wisconsin to grant a similar charter? If such joint action was necessary to give such validity, then the refusal or mere failure of the one state to so act would

wholly prevent the exercise of any jurisdiction by either state. "Concurrent jurisdiction" are words usually applied to two or more courts. When so applied, no one has ever pretended that the exercise of such jurisdiction by the one court was dependent upon its concurrent exercise by any other court. On the contrary, all recognize the authority of each such tribunal to deal with the same subject-matter, at the choice of the suitor. This is illustrated by the jurisdiction of state and federal courts in the same territory, as to controversies between citizens of different states and also as to other matters. They never concur in each other's actions, but each proceeds separately and independently of the other. The same is true respecting offenses and torts committed upon a river dividing two states, where the courts of each have jurisdiction of the same; for in such case each court must necessarily act separately and independently of the other. Such jurisdiction of the courts of the respective states, when concurrent, extends to the whole of that portion of the river dividing them: *State v. Plants*, 25 W. Va. 119; 52 Am. Rep. 211; *Carlisle v. State*, 32 Ind. 55. Although the words "concurrent jurisdiction" and "jurisdiction" are usually applied to the rightful authority of courts, yet they are not limited to such use. On the contrary, they are broad enough to embrace also the exercise of both legislative and executive powers: *Kendall v. United States*, 12 Pet. 623; *Sherlock v. Alling*, 44 Ind. 184. Thus it is said in the case last cited "that this state [Indiana] possesses concurrent jurisdiction with the state of Kentucky on the river at the place where the cause of action, if any, arose. The jurisdiction may be exercised in such manner as the state shall elect. It was exercised in unmistakable language in the constitution, by declaring that the state possesses such concurrent jurisdiction, in civil and criminal cases, with the state of Kentucky. The jurisdiction which the state possesses is not limited to the service of process. It is general, and includes the right of legislation touching all civil and criminal cases on the river. . . . The jurisdiction asserted by the constitution is not limited to judicial proceedings in civil and criminal cases. It is such as the state may choose to exercise touching such actions, and legislation is included." The three co-ordinate branches of the state government must necessarily, in their respective spheres, possess powers which are co-extensive with each other: *Worcester v. Georgia*, 6 Pet. 570.

The words "concurrent jurisdiction" must have been used,

in the compact between the federal government, Wisconsin, and Minnesota, in the sense in which they had previously been used and were generally understood. When, therefore, by such compact it was in effect provided that each such state shall have "concurrent jurisdiction" on that portion of the River St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portions of the river by the other state. In other words, by such compact each state secured to itself such "concurrent jurisdiction" upon the half of the river within the territorial limits of the other state, by reducing what would otherwise have been its exclusive jurisdiction upon its own half to mere "concurrent jurisdiction." The result is, that neither of these states could, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portions of the river: *President etc. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46; *Attorney-General v. D. & B. B. R. R. Co.*, 27 Id. 631. Of course, no two structures or bodies can occupy precisely the same space at the same time upon a river, any more than elsewhere. Nevertheless, either state may, in aid of navigation, assume, or authorize the assumption of, reasonable occupancy, possession, and control of portions of such navigable waters, provided the same is reasonably consistent with similar occupancy, possession, and control which may be assumed or authorized by such other state. Concurrent jurisdiction, to be of value to the respective states or to any one, must have a practical application. Such application should, moreover, be consistent with the reasonable continuance of a navigable channel as a public highway between such states, and must necessarily remain subject to any regulation of commerce by Congress under the commercial clause of the federal constitution.

Here large portions of the defendant's booms were upon this side of the river, and between the main channel and the Wisconsin shore. It may be, as contended, that the defendant's charter grants, or purports to grant, authority, or at least that the defendant under it has assumed to exercise authority, which transcends the rightful powers of Minnesota, and infringes the concurrent jurisdiction of Wisconsin. Assuming such to be the case, and the question recurs whether such excess of rightful jurisdiction is available to the plaintiffs. In

Rundle v. D. & R. Canal Co., 14 How. 80, the plaintiffs owned certain mills in Pennsylvania, opposite Trenton, New Jersey, supplied with water from a dam in the Delaware River, by a title running back prior to 1771. In that year, the two provinces, which subsequently became the states of Pennsylvania and New Jersey, respectively passed acts declaring the river a common highway for the purposes of navigation, and appointed commissioners with full power to improve such navigation, and remove any obstructions. By compact in 1783, it was agreed by the two states that the river should continue to be and remain a common highway in its whole length and breadth, equally free and open for the use, benefit, and advantage of each of the two states. The defendant company was incorporated under the laws of New Jersey in 1830, and was thereby authorized to and did construct a canal in that state, with a feeder from a dam in that river above the plaintiffs.' The action was brought by reason of the diversion of such water, to the damage of the plaintiffs. The court held, in effect, that the plaintiffs had no grant of the usufruct of the waters of the river, but only a license to draw from their dam; that such license was revocable and in subjection to the superior right of the state to divert the water for public improvements, either by the state directly, or by a corporation created for that purpose; that the plaintiffs, being but tenants at sufferance in the usufruct of the water of the two states who owned the river as tenants in common, were not in a condition to question the relative rights of either state to use its waters without the consent of the other; that as, by the laws of their own state, the plaintiffs could have had no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so they could not sustain a suit against a corporation created by New Jersey for the same purpose, which had taken a part of the waters. The principle of that decision seems to be, that a mere private party should not be heard to complain that one of two states, divided by such river, had invaded the rightful jurisdiction of the other by diverting more than its share of the waters. So here, we think, the plaintiffs are not entitled to be heard as to whether Minnesota has infringed the rightful jurisdiction of Wisconsin. This state is not a party to this suit, and her comparative rights in and upon the waters of the river at the points in question cannot be adjudicated in this action. Whether such a controversy would be most properly

determinable in the courts of either state or of the United States (as in *Wisconsin v. Duluth*, 96 U. S. 379; *South Carolina v. Georgia*, 93 Id. 4; *Alabama v. Georgia*, 23 How. 505), we are not here called upon to decide. It is enough to know that such non-exercise of jurisdiction by the one state is not available as a substantive cause of action against a corporation created by and acting under the authority of the other state.

4. The defendant is certainly not liable for its failure to go outside of the scope of its charter and invade the territory of Wisconsin by taking possession of Rice Lake, and placing booms therein, and constructing the necessary inlet and outlet for the proper storage of all logs that may have been adrift in the river.

5. The liability of the defendant, if any, must arise out of its failure to perform some of the duties imposed by its charter, or the careless or negligent manner in which it performed such duties. These questions we are unable to solve as mere matters of law. The record, as indicated, presents too many disputed facts and circumstances and too many disputed inferences to be drawn from admitted facts to authorize us in saying that the case was properly taken from the jury, and determined as a matter of law. Of course the defendant was, under no view of the case, liable for any remote and speculative damages. It was, however, bound to the faithful performance of the duties imposed by the charter as to such lower booms and additional booms in aid thereof. They did not extend above Marine Mills. Whether below that point the capacity of the defendant's works and booms might, with reasonable precautions and diligence, have been increased by improving Mud and Butler lakes, or otherwise, were necessarily questions of fact, which we are not at liberty to say were conclusively negatived. The defendant was required, so far as it could with reasonable diligence, by such works and booms, to supply the ordinary demand of the log-driving business on the river, as measured by such use in previous years. In case of pressure of logs from above, it was, moreover, bound to exercise reasonable diligence, under all the circumstances, in delivering logs, and thus relieving its booms at the foot thereof, and thus increase its capacity for receiving logs the more rapidly at the upper end of such lower boom. There is evidence tending to show that the rapidity of such delivery was considerably less at about the time of the commencement of the jam in 1883 than it was a short time before or a short

time afterwards, and that it was much less at that time that year than in other years. But the defendant was not bound to go beyond its capacity under its charter, and at all times keep open a navigable channel for steamboats and other water-craft, however unusual or extraordinary might be the press or jam from above of logs and timber in the river.

It is claimed that in June, 1883, the river at the points in question was unusually crowded with logs coming from all the tributaries above simultaneously, and to such an extent as to make it impossible for the defendant to assort and deliver them as fast as they came. This may be so; and it may be that the defendant was not in fault. Its liability, if any, must rest upon its failure to perform, or its negligent or careless performance of, some duty imposed by its charter, but can never be based upon a condition of things produced by natural causes and the action of others, and which, under its charter, it had no means of preventing. It is to be remembered that the defendant is not a log-driving corporation, but one of the character indicated, and in aid of navigation. It could not rightfully, by its booms, unnecessarily interfere with the navigation of steamboats and other water-craft; but it had the right to intercept, store, and deliver logs adrift in the river, as indicated by the authorities cited. In some states they have gone so far as to forbid the floating of logs in such navigable rivers without their being rafted or inclosed in boats and under the control of men actually upon them: *Craig v. Kline*, 65 Pa. St. 399; 3 Am. Rep. 636. This is on the theory that such uncontrolled floatage is necessarily destructive, more or less, of any other navigation upon the river, while it continues. Thus far, it would seem, Minnesota and Wisconsin have allowed logs above the defendant's works to go promiscuously adrift regardless of the consequences to other navigators and interests upon the river. Certainly, a booming corporation, created in the interest of the public as well as log-owners, for the very purpose of bringing order out of the necessary confusion thus produced, should not be held responsible for what it has no capacity nor corporate power to prevent, but only for its failure to perform its duty, or its negligence or carelessness in such performance. Since there must be a new trial, further discussion is unnecessary.

6. There seems to be no serious controversy but what the plaintiffs have succeeded to the alleged claim for damages accruing to Walker, Judd, and Veazie, as against everybody,

unless it be their creditors; and there is no claim that the defendant is such.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

RIVER AS BOUNDARY BETWEEN STATES, AND RIGHTS OF RESPECTIVE STATES OVER: See *Butternuth v. St. Louis B. Co.*, 123 Ill. 535; 5 Am. St. Rep. 545.

BOOM COMPANIES, RIGHTS AND LIABILITIES OF: See *West Branch Boom Co. v. Lumber and Land Co.*, 121 Pa. St. 143; 6 Am. St. Rep. 766.

McDERMOTT v. KERNAN.

[72 WISCONSIN, 268.]

HOMESTEAD EXEMPTION NOT LOST BY TEMPORARY REMOVAL THEREFROM.

Where a woman, residing with her husband and children in rooms over a saloon adjoining a dance-hall on the same lot, after his death not wishing to keep a saloon, or to have her children occupy rooms over one, removes from the building, leaving some furniture therein, and rents the same, but always intending to return and live in it, at all events as soon as her daughters married, the exemption of the premises from execution, as her homestead, is not impaired by her removal.

ACTION to set aside a deed. The opinion states the facts.

C. M. Bice, for the appellant.

Somers, Somers, and Dorr, for the respondents.

ORTON, J. This action was brought by the appellant, as a judgment creditor of the respondent Sarah A. Delaney, after an execution had been returned unsatisfied, to set aside a conveyance made by said Sarah to the respondents Bernard and Mary Kernan, of certain premises, in aid of said execution, on the ground of fraud. The evidence was, in substance, as follows: The said Sarah A. Delaney, prior to the eighth day of February, 1880, occupied the premises in controversy with her husband and six children as their homestead, at which date her husband died, and she continued to so occupy said premises with her children until the nineteenth day of April thereafter. The premises were a lot in the city of Milwaukee of fifty by one hundred feet, and a house thereon, with a saloon room below, and four rooms above used as a family dwelling, and a hall thirty feet in length adjoining the house, used for dancing, or other social purposes. The said Sarah did not wish to have her children occupy said rooms over a

saloon, and she did not wish to keep a saloon, and she accordingly moved out of the building, leaving, however, some furniture and a few pictures therein; and rented and occupied other premises, and kept a boarding-house, and rented said premises to one of her sons for the most of the time until May, 1887, when she rented them to one Miller for two years; and all the time she intended to return to said premises, and either live there again and let her sons keep the saloon, or convert the building into a dwelling or boarding house, and occupy the whole thereof for such purpose. She intended to return when her daughters married at all events, and without delay. She borrowed money from time to time of the respondent Bernard Kernan, who was the husband of her daughter, the respondent Mary Kerman, in all of two hundred dollars or more; and, to secure the same, deeded said premises to said respondents in June, 1887, so that the said Bernard might reimburse himself out of the rents thereof. This is the deed sought to be set aside.

The court, among other things, found that the said "Sarah A. Delaney removed from her said homestead for a temporary purpose, and with a fixed and abiding intention to return thereto, and live upon and occupy the same as her homestead, as soon as her circumstances would allow, . . . and that she has purchased, acquired, or owns no real estate except that above described." This finding is sustained by the evidence. The conclusion of law from the facts so found is "that, at the time of said conveyance, said premises constituted and was the homestead of said Sarah A. Delaney, and as such was and is not liable or subject to the lien of the plaintiff's judgment therein."

The contention of the learned counsel of the appellant is, that the evidence shows that the premises were not owned and occupied as a homestead by the respondent Sarah A. Delaney, as required by the statute, to make them exempt from sale under said execution; and cites *In re Estate of Phelan*, 16 Wis. 76; *Herrick v. Graves*, 16 Id. 157; and *Jarvais v. Moe*, 38 Id. 440. The first two cases were decided under the law as it was previous to the statute of 1858, which is the present statute. The language of the opinions used was applicable to the peculiar facts of those cases; and yet the cases supposed in the opinion of Mr. Justice Paine and that of the present chief justice, in which the homestead would not be lost by temporary removal with the intent to return, even if in the mean time

the premises had been rented to a tenant, or not, in their facts, as strong in favor of exemption as the present case. The statute of 1858 was no doubt intended to provide for exemption in cases where, before, the facts of removal and sale were held to be evidence of an abandonment of the homestead. The present statute has made such facts consistent with the homestead right by providing that "such exemption shall not be impaired by temporary removal with the intention to reoccupy the same as a homestead, nor by a sale thereof."

The language quoted by the learned counsel from the opinion of the late eminent chief justice in *Jarvais v. Moe*, *supra*, is applicable to this case, and sufficient authority for holding that the facts of this case establish a homestead. "The statute does not limit the measure of removal, but it does the kind of removal. To preserve his home upon removal, the temporary purpose, the *animus revertendi*, must be certain and definite." The same learned chief justice says: "Still 'owned and occupied' by the debtor, in the terms of the earlier statute, though the later statute allows the possession of the house and land to be constructive only during temporary absence in right of the continuing home." This language answers the argument of the learned counsel, and clearly establishes the homestead right of the debtor in this case. Without commenting further on the facts of this case, it is sufficient to say that the above cases, and all subsequent cases in this court, make the facts of this case perfectly consistent with the homestead right of the respondent Sarah A. Delaney in said premises: *Zimmer v. Pauley*, 51 Wis. 282; *Phillips v. Root*, 68 Id. 128.

By the COURT. The judgment of the superior court is affirmed.

TEMPORARY REMOVAL FROM HOMESTEAD DOES NOT OPERATE AS ABANDONMENT: See *Cabeen v. Mulligan*, 37 Ill. 230; 87 Am. Dec. 247, and note 249; *Kaes v. Gross*, 92 Mo. 647; 1 Am. St. Rep. 767, and note. Abandonment of a homestead cannot be accomplished by mere intention; there must be a discontinuance of the use, coupled with an intention not again to use as a home, to be an abandonment: *Archibald v. Jacobs*, 69 Tex. 248.

FATH v. KOEPPPEL.

[72 WISCONSIN, 289.]

POWERS OF FISH INSPECTOR JUDICIAL. — The power of a fish inspector to determine the quality and healthfulness of fish offered for sale in the markets of a city, and if found to be unwholesome or unfit to be eaten, to condemn and destroy it, is judicial in its nature, and he is not liable to any one in an action for damages, however erroneously, ignorantly, negligently, or carelessly he may act in the exercise of such power, provided he acts within his jurisdiction.

ACTION for damages. The opinion states the case.

Eugene S. Elliott, for the appellant.

John C. Ludwig, for the respondent.

ORTON, J. The material allegations of the complaint are: 1. The plaintiff is a dealer in fruits and fish in the city of Milwaukee; 2. The defendant was and is the duly appointed meat inspector of said city, and it was his duty to carefully inspect all fish offered for sale in the markets of said city, and to destroy all such fish as are unwholesome and unsuitable to be eaten by man; 3. While he was so acting as meat inspector he was and is an unfit and unsuitable person, and wholly incompetent to inspect fish, and to judge whether they are fit to be eaten; and he well knew his unfitness for that position, and to inspect fish, and to judge whether they are fit to be eaten; 4. While he was so acting, he so negligently ignorantly, and carelessly performed his duties as such inspector, that he did, without any reason or cause, destroy and make unfit for sale a large quantity of good and fresh fish, offered for sale by the plaintiff at a public market in said city. By reason of the premises, the plaintiff suffered damages. A general demurrer to the complaint was overruled, and the defendant appealed.

The complaint does not state a cause of action against the defendant as meat or fish inspector of the city of Milwaukee, and the demurrer should have been sustained. The plaintiff, at least, is bound by the allegations of his complaint; and we must take it for granted that there is such an office as fish inspector, and that the defendant was such an officer, with the duties and authority to inspect fish, and judge whether they are fit to be eaten, and to destroy such as are unwholesome, as alleged in the complaint. To sustain the complaint, the learned counsel of the respondent cites section 6, chapter 470, of the Laws of 1885, an amendment to the charter of said

city, to show that the defendant had no authority to judge whether or not any meat or fish, etc., is dangerous to health, and whether the same shall be destroyed or buried, and that such duties and authority are conferred only upon the commissioner of health of said city, and that said commissioner had no authority to delegate such judicial or discretionary power to the defendant or to any one. This may be so, but the complaint presents no such case. The defendant is made the person to inspect fish, and to judge whether they are fit to be eaten, and to destroy them if unfit; and if the contention now is that he was not so acting as fish inspector, he eliminates from his complaint every allegation that would give the defendant any power to either condemn or destroy the plaintiff's fish, or to injure him in any way. The argument of the learned counsel would make the defendant a mere nominal inspector, and of course inspection alone could not injure any one. He admits away his case when he cites the provision of the charter which creates the office with such judicial or discretionary power as to inspect, judge of their quality, condemn, and destroy fish offered for sale in market, and admits that such power is so judicial and discretionary that it cannot be delegated to another; for it is alleged in the complaint that the defendant was the "duly appointed fish inspector of the city, and that it became his duty to carefully inspect fish, and to destroy all such fish as are unwholesome and unsuitable to be eaten"; and his liability in the action depends upon his being "an unfit and unsuitable person, and wholly incompetent to inspect fish, and to judge whether they are fit to be eaten"; and upon his knowing his unfitness for that position, "and to inspect fish and judge whether they are fit to be eaten," and upon his negligently, ignorantly, and carelessly performing such duties as fish inspector. We fully agree with the learned counsel that these are judicial duties and powers, and cannot be delegated; and it follows that the defendant cannot be held liable for the careless, improper, or erroneous performance of such duties, or exercise of such judicial powers, acting within his jurisdiction as fish inspector.

The powers conferred on the defendant by law, according to the complaint, are plainly and clearly judicial, and of great importance. He is vested with power to determine the quality and healthfulness of fish in market, and if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, as it concerns the public

health, and as it may affect the rights of property; and the officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible in an action for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if he act within his jurisdiction. This principle is stated and given force in *Steele v. Dunham*, 26 Wis. 393, by the present chief justice, to shield from liability members of an equalizing board, or board of review of assessments, who are charged with liability for damages to the plaintiff for corruptly and oppressively increasing the valuation of certain property without proof. Much more should this principle protect from actions for private damages an inspector of fruits and meats, acting in the interest of the public health. This principle protects all officers exercising judicial powers, whatever they may be called. It is "a judicial privilege," and has "a deep root in the common law," and found "asserted in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions": *Yates v. Lansing*, 5 Johns. 291. It is a discretionary authority, where the determination partakes of the character of a judicial decision: *Druecker v. Salomon*, 21 Wis. 621; *Salem v. E. R. Co.*, 98 Mass. 431. It has application to a board of health: *Raymond v. Fish*, 51 Conn. 80; 50 Am. Rep. 3; and to an inspector of provisions: *Seaman v. Patten*, 2 Caines, 312; and to a board of pilot commissioners: *Downer v. Lent*, 6 Cal. 94; 65 Am. Dec. 489. The learned counsel of the appellant has collated these and many more cases, closely in point, in his excellent brief on this question. But this principle is so elementary, and so well established in all like cases, that reference to any further authorities is unnecessary. The complaint most clearly ranks the defendant as a judicial officer, and places him under the protection of this principle, and it therefore fails to state a cause of action against him.

By the COURT. The order of the superior court is reversed, and the cause remanded for further proceedings according to law.

JUDICIAL AND MINISTERIAL ACTS DISTINGUISHED: See the note to *Flourmoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 472-477. Judicial action is adjudication upon rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered: *In re Saline Co.*, 45 Mo. 52; 100 Am. Dec. 337.

EVANS v. VIRGIN.

[72 WISCONSIN, 423.]

APPLICATION OF PROCEEDS OF SALE OF ATTACHED PROPERTY IN HANDS OF SHERIFF, AFTER DISSOLUTION OF ATTACHMENT. — Upon the dissolution of an attachment, the money realized from the sale of the attached property, in the hands of the sheriff, is not to be regarded in the custody of the law in such a sense as to preclude the sheriff from applying it upon an execution against the property of the same defendant issued to and received by the same officer after the receipt of such money. Nor is the defendant, in such case, entitled to so much of such money as will satisfy the costs and damages awarded to him upon the dissolution of the attachment, but such costs and damages are to be applied, as a set-off, upon the unpaid balance of the plaintiff's judgment.

ACTION commenced against the firm composed of N. H. and H. H. Virgin, for a firm debt. An attachment was issued in the action, and property of the firm, and separate property of N. H. Virgin, one of the members of the firm, were attached. The defendants answered severally, and traversed the attachment. The supreme court, on appeal, sustained the attachment as to the separate property of N. H. Virgin, but sustained the traverse as to the firm property. It appeared from the record that in the principal action judgment was rendered against both partners, March 2, 1886, for \$68,194.99, and that no appeal was taken from that judgment; that the personal property attached belonged wholly to the firm, or in part to N. H. Virgin, and being perishable, was ordered sold and converted into money, which was done; that the amount realized was about \$2,900, which, after deducting expenses, was held by the sheriff, subject to the order of the court; that, after the decision of the supreme court above referred to, an execution was issued on the judgment in the principal action to said sheriff, and on June 8, 1887, he applied the net proceeds in his hands, \$2,728.28, to the execution, and paid over the same to the plaintiff; that there was no other property out of which to collect the large balance of the judgment remaining unpaid; that after the entry of judgment on the traverse according to the mandate of the supreme court, the defendants, at the October term, 1887, applied to the trial court for an order directing the sheriff to pay over to them the proceeds of the sale of the partnership property attached, and in answer the plaintiff asked for an order that the application of the proceeds on the execution and the payment of the same to the plaintiff be in all things ratified and approved. On the hearing the court adjudged that the attachment of the firm property be dis-

solved, and that the defendants have and recover their costs upon the traverse taxed at \$150, and \$200 damages; that said sum of \$350 be set off against the judgment in the principal action. It was also ordered that said proceeds, so in the hands of the sheriff, were legally liable to be taken on the execution as they were, and that the payment thereof by the sheriff to the plaintiff, to apply on the execution, was a full compliance on his part with the order to deliver the firm property to the defendants, and was a complete discharge thereof. From this order the defendants appealed.

W. H. Beebe, and Bushnell and Watkins, for the appellants.

Carter and Cleary, for the respondent.

CASSODAY, J. If, upon the trial of an issue of traverse of an attachment, the court finds for the defendant, then the statute requires that the defendant's costs of such trial be taxed, and an order "entered that the property attached be forthwith delivered up to the defendant": R. S., sec. 2746. In this case the trial court found for the plaintiff on the trial of the issue of traverse; but on the filing of the *remittitur* on the reversal of that part of the order entered thereon relating to the firm property, that court did tax the costs of the defendants upon such trial, and entered an order, in legal effect that the firm property so attached be forthwith delivered up to the defendants. This was in pursuance of numerous cases in this court: *Morawitz v. Wolf*, 70 Wis. 516; *Clark v. Lamoreux*, 70 Id. 512; *Braunsdorf v. Fellner*, 69 Id. 335; *Keith v. Armstrong*, 65 Id. 227. The authority of these several decisions, however, does not extend beyond the points decided in each, and the facts upon which such decision was based. "It is a general rule," said Marshall, C. J., "that the positive authority of a decision is co-extensive only with the facts on which it is made": *Ogden v. Saunders*, 12 Wheat. 333. True, in the case first cited Mr. Justice Lyon said: "The statute is imperative, and contains no exception whatever. The order must be entered in every case pursuant to its requirements, or it is error. It is quite immaterial that the circumstances of the case may be such that the order, when entered, will be inoperative." But neither in that case, nor in any of the other cases above cited, was the property or the proceeds thereof in the hands of such attaching officer taken or applied by him upon an intervening valid process against the property of the same defendants as in this case.

As said upon the former appeal, "the affidavit stated a good ground for attachment against the property of the firm, and was therefore a protection to the officer": 69 Wis. 158. The property, being perishable, was, under the order of the court, properly converted into money, which was held by the sheriff in lieu of the property attached. The proceeds of such property, consisting of money in the hands of the attaching officer at the time when the execution was received by him, were rightfully levied upon, and paid over and returned as so much money collected, without exposing the same for sale as provided in section 2987 of the Revised Statutes, unless the sheriff was precluded from making such levy by reason of the money being in his own hands. Courts have so held, even in the absence of such statute: Freeman on Executions, sec. 111; Herman on Executions, sec. 124. Mr. Freeman considers the preponderance of the cases in this country as holding that money in the hands of a sheriff or constable belonging to the defendant, being the surplus or residue remaining in possession of the officer after he has satisfied the writ, is not in the custody of the law, and therefore is subject to execution. He says: "The execution having been fully satisfied, the officer ceases to hold the money by virtue of the writ. As to the ascertained surplus, he is said to be liable to the defendant as for money had and received. Such surplus can therefore, while in the officer's hands, be reached by the defendant's creditors": Freeman on Executions, sec. 130, p. 179, and cases there cited. The same author says: "But the officer who has levied upon property may hold the same to answer for subsequent writs which come into his hands while the first levy remains in force. The mere receipt of the subsequent writ operates as a constructive levy upon all the property actually or constructively in his possession under a prior writ": Freeman on Executions, sec. 135. To the same effect is Herman on Executions, sec. 174, p. 249. Of course, the same rule is applicable to successive attachments: *Halpin v. Hall*, 42 Wis. 176; 1 Am. & Eng. Ency. Law, p. 927, subd. 10. "Subsequent valid levies necessarily exclude those prior in point of time but wanting in compliance with the law in essential particulars": 1 Wade on Attachments, sec. 219; 1 Am. & Eng. Ency. Law, 927; *Robinson v. Ensign*, 6 Gray, 300; *Culver v. Rumsey*, 6 Bradw. 598. So here we must hold that, upon the dissolution of the attachment, the money realized thereon, and in the hands of the sheriff, is not to be regarded in the custody of the

law in such a sense as to preclude the sheriff from applying it upon the execution against the property of the same defendants, issued to and received by the same officer after the receipt of such money: *Freeman on Executions*, sec. 135; *Sherry v. Schuyler*, 2 Hill, 204; *Van Winkle v. Udall*, 1 Id. 559; *Gilman v. Williams*, 7 Wis. 329; *Woodmansee v. Rodgers*, 59 How. Pr. 402.

It is claimed, however, that in any event the defendants were entitled to enough of said money to satisfy the costs and damages awarded to them upon such dissolution of the attachment, instead of applying such costs and damages as a set-off upon the unpaid balance of the plaintiff's judgment. But such set-off was so allowed in strict obedience to the statute. Whether the trial of such traverse is before or after the trial of the principal action, the statute requires that the amount of such damages and costs upon such dissolution shall be applied "as a set-off to the plaintiff's demand as established upon the trial" of the principal action when not in excess of it: *R. S.*, sec. 2746; *Henderson v. Allen*, 56 Wis. 177.

By the COURT. The order of the circuit court is affirmed.

PROPERTY IN HANDS OF SHERIFF, WHETHER SUBJECT TO LEVY ON EXECUTION: See *Freeman on Executions*, sec. 130.

BLODGETT v. ABBOT.

[72 WISCONSIN, 516.]

RAILROAD COMPANY ACCEPTING PERISHABLE FREIGHT TO BE CARRIED OVER ITS OWN AND CONNECTING ROADS is bound to forward it as promptly as it can, until it has delivered or offered to deliver it to the connecting carrier, and it cannot shield itself from liability for failure to perform its duty by merely showing that its agent supposed that there would be a delay in forwarding it by the connecting carrier. The company is bound to know when it contracts to carry such freight in that manner whether it can be carried through without such delay as will destroy or injure freight of that character.

ERROR IN RECEIVING IMMATERIAL EVIDENCE IS MATERIAL, when the court, after objection, receives it as material, and may have given it weight in disposing of the case.

STATEMENT AS TO TIME REQUIRED FOR PERISHABLE FREIGHT TO REACH ITS DESTINATION, made by a railroad agent to a shipper, is admissible in evidence in an action to recover damages for delay in transporting it, when such statement may have been the inducement of the contract. A statement that such freight would reach its destination at a certain time would have the force of a contract, and if the time was a reasonable one, the contract would be within the scope of such agent's authority.

MATERIAL QUESTION OF FACT SHOULD BE SUBMITTED TO JURY. In an action to recover damages for delay on the part of a railroad company in the transportation of perishable freight, where the evidence as to whether it was the duty of the conductor of the train, to which the car the freight was being carried in was attached, to place the car on a "Y" at the crossing of a connecting road by which the freight was to be forwarded to its destination, is conflicting, the question, which is a material one, should be submitted to the jury.

ACTION to recover damages. The opinion states the case.

Lamoureux and Park, for the appellant.

Howard Morris, D. S. Wegg, Winkler, Flanders, Smith, Botum, and Vilas, for the respondents.

ORTON, J. The following is a sufficient statement of the facts to show the pertinency of the questions raised and decided:—

The Wisconsin Central railroad, represented by the defendants as the trustees thereof, runs in part from Plover to Junction City in a northwesterly direction, at which last point it is crossed by the Chicago, Milwaukee, and St. Paul railroad, which runs thence in a northerly direction to Mosinee. On the sixth day of November, 1886, the defendants contracted with the plaintiff to carry a car-load of potatoes for him from Plover, by the way of Junction City, to Mosinee, for certain freight charges then paid, and received the same on board of their car about twelve o'clock on that day. The potatoes, which were of the value of about two hundred dollars, were so received in good condition, and were to be carried with such reasonable dispatch as would comport with the perishable nature of such property at that season of the year, and delivered to Joseph Desert & Co., or on their order, at such place of destination. The plaintiff had purchased said potatoes from one William Carley at Plover, and said Carley acted as the agent of the plaintiff in making said contract with the agent of the defendants at that place. The weather had been warm, but was changing to become colder. The train having the car arrived at Junction City about six o'clock that afternoon, on Saturday, and the car was left standing on the passing track of said road, from which place it could not be directly taken and shipped on the other road. There was a "Y" between the roads, upon which it would have to be run before it could be so taken and shipped. On its arrival, the car was billed to the other road, and the agent of that road

at that point was notified of it, and he made arrangements to receive it on that road, and send it along with an extra or wild freight train, which would and did arrive there from the south at 8:48 the same evening, and notified the conductor of said train to take it; and supposing the car to be on the "Y," the conductor of that train went there to get it, but found that it had not been placed there, and for that reason he could not and did not take it along; and that train reached Mosinee about an hour afterwards, and the car would have been carried with said train had it been placed upon the "Y."

As to whether it was the duty of the conductor of the train which brought it there to have placed the car on the "Y" at Junction City, and as to whether such is the usage in such cases, there was some conflict of evidence. Burns, the agent of the defendants at that place, testified that such was the usage and custom; and he must have supposed that the conductor of that train had left the car upon the "Y," as he notified the agent of the other company that it was there, ready for shipment; and said agent directed the conductor of the extra train on that road to go there, and he went there to get it; and the train-dispatcher of the other road had telegraphed the agent of said road to have that train take the car, and the agent testified that they went to the usual place for the car, and it was not there. Dustin, the conductor of the train that brought the car to Junction City, testified that it was not his duty to put the car on the "Y," as the train was a through-train, and ought not to be stopped for such purpose; and that it was the duty of those in charge of a local or way freight train, which would arrive there the next morning, to place it on the "Y," and that such was the usage. But this witness testified that he did not know that this car contained perishable freight, and that such freight ought to be forwarded the earliest possible moment, and that in handling such freight he had placed cars upon the "Y," and that he could have done it in this instance if it had not been for the delay. There was a local or way freight train of defendants standing on the main track, headed the other way, which had to be moved in order to let this car in upon the "Y," which would have taken some time. This local freight train might have placed the car upon the "Y," but the conductor had not been ordered to do so, and did not know that it contained perishable freight. The train-dispatcher of the defendants' road testified that, as a general rule, the conductor of a through

freight train did not place cars upon the "Y"; but he testified, further, that if a car contained perishable freight, it should go through as soon as possible; and if it should not delay him too long, the conductor of a through freight train ought to put such a car on the "Y"; and that the custom is, in handling perishable freight, to give it precedence over everything else.

The car was put upon the "Y" the next morning by those in charge of a local or way freight train of the defendants going the other way, and it was taken that night by those in charge of an extra or wild freight train on the other road, and arrived at Mosinee about ten o'clock on that (Sunday) evening. When the car was at Junction City on Sunday afternoon, the potatoes were in good order; and on Monday morning, when the consignees were ready to receive them, they were frozen badly, and a large part of them were worthless from this cause, and rejected. The consignees were notified by said Carley, on Saturday, that the car would arrive at Mosinee that evening, and they were ready, with teams and men, waiting for the arrival of the car, to remove the potatoes therefrom, until eight o'clock, when they were notified that the car would not arrive that night. The weather became very cold on Sunday and Sunday night, and began to grow colder on Saturday. There was some testimony tending to show that it was not in the ordinary course of business for any freight train on the other road to take this car, except a regular one. But this would seem to be immaterial, from the fact that the wild or extra freight train on that road was ready and made an effort to take it, and would have taken it, on Saturday night, if it had been placed upon the "Y," and the same kind of train on that road did actually take it on Sunday night. The first regular freight train on that road after the arrival of the car at Junction City was not due at Mosinee until the next Monday morning. The circuit court, on this evidence, directed the jury to render a verdict for the defendants, and entered judgment thereon.

This being substantially the evidence, the following errors assigned may be readily disposed of, and the one in connection with this last item of evidence will be first considered:—

1. The witness Burns was asked by the defendants' counsel whether he had any knowledge that any other train except this regular one would go north on the other road to Mosinee.

This was objected to as immaterial, incompetent, and irrele-

vant. The objection was overruled, and the answer was, that he did not. This evidence could not affect the liability of the defendants for their delay in not forwarding such perishable goods, to the extent of their ability to do so, until their delivery or offer to deliver them to the other road as the connecting carrier. They must acquit themselves of this duty, and they cannot shield themselves from it by delays on the connecting road. They were bound to know, when they so contracted, whether they could be carried through without such delay as would destroy or injure such perishable freight. Suppose that the car had never left Plover until the potatoes had become valueless by freezing, could the defendants escape liability by proof that there was no regular train on the other road to receive it before such time? Such is not the law: *McLaren v. D. & M. R. R. Co.*, 23 Wis. 138; *Petersen v. Case*, 21 Fed. Rep. 885. The principle is too clear for further reference. It may be that the error as well as the evidence was quite immaterial, as the proof is clear that there was no unreasonable delay on the other road. Those in charge of that road did not wait for their regular train on the next Monday morning after the potatoes were frozen, but did their best to forward the car on their first extra train Saturday evening, and they finally forwarded it by the next extra train as soon as it was placed on the "Y" by the defendants, where they could reach it. But receiving such evidence, after objection, as material, the court may have given it weight in disposing of the case, and it was therefore a material error.

2. The witness Carley was asked what was said at the time (meaning when the contract was made) in regard to the length of time it would require to reach Mosinee. The court sustained the objection of the defendants. This was a flagrant error. Considering the season of the year, and the perishable nature of this kind of freight by freezing, such statement might well have been the very inducement of the contract. There is so great a similarity between the action *ex contractu* and *ex delicto* in such a case, or of failure to perform the contract and to discharge the duty, that it is difficult to determine which it is. The difference is more in form than in substance. Such a statement might greatly affect the duty of the defendants and the conduct of the plaintiff. The agent Carley might have been governed by such a statement in entering into the contract on behalf of the plaintiff; and his conduct in not giving this kind of freight more personal attention to pro-

tect it from injury on the way, and in having the consignees ready to receive it and take care of it on its arrival at the end of the route, may have been caused by it, and this the plaintiff offered to show. Without any such statement, if the defendants knew that the delay would be as it was, and that there were any reasons why the potatoes would not arrive at their destination until endangered by frost, and this they were bound to know (and they now claim that they did know that none but a local freight train could put that car on the "Y," and none but a regular freight train on the other road could or would take and forward it), then it was clearly their duty to have so informed the agent Carley before he entered into the contract or shipped them: *Ayres v. C. & N. W. R'y Co.*, 71 Wis. 372. Carley, the agent, notified the consignees that the car would arrive that night, and they were at the depot ready to receive and take care of them. A statement of the agent of the defendants at the time that the car would arrive that night at Mosinee, under such circumstances, would have the force of a contract to that effect: *Strohn v. D. & M. R. R. Co.*, 23 Id. 130; 99 Am. Dec. 114. The agent had the authority to so contract, because such time of carriage would have been reasonable for such freight at such a time: *Wood v. C., M., & St. P. R. Co.*, 68 Iowa, 491; 56 Am. Rep. 861; *Strohn v. D. & M. R. R. Co.*, *supra*.

3. The evidence as to whether it was the duty of the conductor of the train in which the car went to Junction City to have placed it on the "Y" was, to say the least of it, conflicting; and that being a most material question in this case, it ought to have been submitted to the jury: *Leavitt v. C. & N. W. R'y Co.*, 64 Wis. 228, and a great many cases cited in the brief of the appellant, to which reference may be had.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

LIABILITY OF COMMON CARRIER FOR LOSS OR DETERIORATION FROM DELAY IN TRANSPORTING GOODS: See note to *American Express Co. v. Smith*, 31 Am. Rep. 567-570.

LIABILITY OF CARRIER WHO CONTRACTS TO CARRY GOODS ON OWN AND CONNECTING LINES: See *Savannah etc. R'y Co. v. Pritchard*, 77 Ga. 412; 4 Am. St. Rep. 92.

WHERE COMMON CARRIER RECEIVES GOODS, AND CONTRACTS TO DELIVER THEM AT DESTINATION within reasonable time, and fails to deliver in time, the measure of damages for such default is the depreciation in the market

value of goods at the place of destination between the date when the goods should have been delivered and when they actually were: *E., T., V., & G. R. R. Co. v. Hale*, 85 Tenn. 69; *St. L., I. M., & S. R'y Co. v. Mudford*, 49 Ark. 502.

DUAME v. CHICAGO AND NORTHWESTERN R'y Co.

[72 WISCONSIN, 523.]

QUESTION WHETHER DEATH OF PERSON WAS OCCASIONED BY GROSS NEGLIGENCE, recklessness, and criminal misconduct of the employees of a railroad company, is for the jury, and not for the court, unless the evidence to that end is perfectly conclusive and overwhelming.

WHERE RAILWAY TRAIN, AFTER PASSING HIGHWAY CROSSING, IMMEDIATELY RETURNS, a person approaching the crossing, and having no reason to expect such return of the train, is not bound to stop and look and listen before attempting to cross the track.

ACTS OF ONE SURPRISED BY SUDDEN DANGER, HOW JUDGED. — The law does not require that a person who is surprised and confused by a sudden danger should act or be judged according to any strict or fixed rule.

DUTY OF RAILROAD COMPANY WHERE TRAIN PASSES CROSSING AND IMMEDIATELY RETURNS. — Where a train passes a railway crossing, and almost immediately returns, it is the duty of the company to have warning given to persons who may be about to cross the track in the mean time.

ACTION to recover damages for the death of the plaintiff's intestate. The opinion states the case.

E. H. Ellis, for the appellant.

Winkler, Flanders, Smith, Bottum, and Vilas, for the respondent.

ORTON, J. This is a brief, yet substantially correct, statement of the facts: The track of the defendant's railway crosses Main Street, in the city of Oconto, nearly north and south. Near the south side of the street there are two side-tracks, with switches, and about seventy feet north of the street there is another side-track, with switch running south. There is a pile of wood, fifty feet long and eight or nine feet high, on the east side of the defendant's right of way, extending north from the north side of the street; and the ground for some distance east of the track north of the street is about four feet higher than the track, and there is a house about forty feet north of the street, and a short distance east of the wood-pile. The train, which consisted of the locomotive, two box-cars, and a caboose, had come out on the main track from one of the side-tracks, and run north across the street; and when it had

passed about two or three car-lengths north of the street, it stopped and immediately backed down towards the street. During this time, the engineer and fireman were on the engine, the conductor stood in the door of the caboose on the east side, one brakeman stood upon the north platform of the caboose, and the other brakeman stood near the switch, south of the street. There was no flagman at this crossing, and no one on the rear end of the train to give warning to those about to cross the track at that place, and whether the bell was rung was a fact in dispute; witnesses for the defendant testifying that it was, and other witnesses testifying that they did hear it. The deceased, in a one-horse vehicle, was driving west on Main Street, towards his home, about seven miles in the country, and had approached within seven or eight rods of the crossing from the east, when the train passed over it, and went on north, out of his sight, and he continued on a trot towards the crossing, and as his horse stepped on the track, the rear car of the train was very near it, and whether he attempted to back out or turn around or pass over, the evidence is uncertain, but his carriage came in contact with the rear car, and he was thrown under its wheels and killed. The conductor of the train, from where he stood, in the east door of the caboose, saw the deceased as he was approaching the crossing, and gave no signal or warning to the engineer to stop the train, as he might have done, and took no precaution whatever to avoid the accident; and when asked on the trial what he did, said that "he did nothing at all; if he hadn't sense enough, let him go." He could have kept watch of the deceased, but did not, and stood there looking over his way-bills, and did nothing. The brakeman standing near the switch, on the south side of the street, also saw the deceased approaching the crossing, and knew that the train was backing down towards the crossing, and yet gave no signal or warning to the engineer in time to stop the train before it came in contact with the deceased; and the other brakeman, standing on the front platform of the caboose, and near the engineer, and who gave the signal to the engineer to stop the train when it was stopped, and whose business it was to look to the other brakeman for signals, was not looking that way all of the time. If the brakeman at the switch gave any signal to stop in time to prevent the collision, he did not see it, because not looking that way at the time, and yet it was his business so to look. The jury rendered a verdict for the de-

defendant by the direction of the court, and of course this is the error complained of on this appeal.

Th evidence tending to prove the negligence of the employees of the defendant is very strong, if not conclusive; and we infer, therefore, that the court directed the verdict on the ground of the contributory negligence of the deceased. We are asked by the learned counsel of the appellant to hold, in view of the evidence, that the killing of the deceased was not only the result of the want of proper care on the part of the conductor of the train and of other employees of the defendant, but that it was occasioned by their gross negligence, recklessness, and criminal misconduct; and that therefore the question of the contributory negligence of the deceased is not in the case. The conduct of the conductor was certainly very reprehensible, and in connection with his own explanation of it, evinces a cold-blooded indifference which, I am happy to say, is not common among railway employees. But without a finding by the jury on such an important question of fact, we would not feel warranted in first passing upon it. The evidence to such end ought to be perfectly conclusive and overwhelming, and we can scarcely believe that the omission of the conductor to signal the engineer to stop the train until he could be assured of the safety of the deceased was willful, or that he apprehended such a collision as the result of it. This is most properly a question for the jury, and not for the court. Inasmuch as the case must again be tried and the questions of negligence be passed upon by a jury, we refrain from expressing an opinion upon them, further than to say that the circuit court erred in directing a verdict for the defendant, on the ground either that the defendant was not guilty of negligence or that the deceased was; but we shall only consider the last as the probable ground for such direction.

As a general rule, and unaffected by other circumstances, the proposition urged in the brief of the learned counsel of the respondent, that one approaching a railroad crossing who may by looking have a timely view of an approaching train, is bound to look and listen for its approach before attempting to cross the track, and that a failure to do so is negligence, may be correct, and the circuit court most probably applied this strict rule to the plaintiff's case. We do not think that such a rule would be applicable to this case. There is a most important fact in this case that materially modifies this strict

rule, and makes it inapplicable, and that is, that this train had just passed this crossing, while the deceased was within a few rods of it, and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption was, that it would go on, and not return. He was thus thrown off his guard. There was no reason to look or listen in that direction further, for it appeared impossible to him that any train from that direction would or could approach the crossing within so short a time. He was entrapped by this unexpected return of the train, for its sudden return over the crossing without warning was to him a trap. We know how it must have appeared to him; for it would have so appeared to any ordinary person with the same knowledge of the situation. Not knowing or supposing, or having any reason to suppose, that the train would immediately return, or that any train would come from that direction, he did as any other reasonable person would have done, and kept straight on without lessening his speed, as if assured that the way was clear, and that there was no possible danger. To have stopped and looked and listened in that direction, under such circumstances, would have been unreasonable, and the law requires no such unreasonable thing as a duty or obligation. When he had come to within a few feet of the crossing, with no signal to attract his attention, he appeared to be suddenly conscious that the end of a box-car was creeping down upon him; and what he did or tried to do in this sudden emergency and danger is not very clearly known, or just how he came to his death under the wheels.

Under such circumstances, the law does not require that he should have acted or be judged according to any strict or fixed rule. He was evidently surprised and confused by the sudden appearance of the train so near him. I have said that the train went north out of the sight of the deceased, and there was testimony to this effect, although it is contended by the counsel of the respondent that the top of the cars might have been seen by him all the time. But this was a question for the jury, when there was conflict of the evidence. But it is quite immaterial whether he could have seen the tops of the cars or not. He had no occasion or reason to look that way any longer after the train had passed on to the north in such

a manner as to lead him to suppose that it would continue on in that direction. But enough has been said to show that the circumstances were such as to make the rule that a person approaching a railroad crossing is bound to look and listen for the approach of the train inapplicable to the deceased. This would seem to be too obvious to require authority. But the principle involved has been often recognized by the courts.

In *Curtis v. D. & M. R. R. Co.*, 27 Wis. 158, the train, being brought up to the station, came to a stop in such a manner as to induce the belief on the part of the passengers waiting on the platform that it had stopped for their reception, and the plaintiff, in attempting to get on, was injured by the sudden starting of the train without signal. It was held "that if the plaintiff so acted as persons of common sense and ordinary prudence and intelligence usually act in like cases, there was no such negligence on his part as would prevent his recovery in the action." And it was further held that this was an act of negligence on the part of the company; and that "it was the duty of the company, if the passengers were not to enter the cars under these circumstances, to have some one there to warn and prevent them, and of the persons in charge of the train not to start it without previous caution or signal given." The application of that case to this is very clear. The deceased had the right to act as ordinarily sensible persons would be likely to do, if this train passed on in such a manner as to induce the belief that it was to continue on in that direction, and drive on, as he did, towards the crossing, without further attention to that train; and to further apply the case, it would seem that the company was negligent in not having some one there to prevent persons from attempting to pass over the crossing in the mean time, if the train was to be almost immediately backed down over the crossing, and the persons in charge of the train should not have so backed the train over the crossing without previous caution or signal given.

In *Bower v. Chicago etc. R'y Co.*, 61 Wis. 457, it was held "that a person approaching a railroad crossing with a team, and having reason to suppose that a regular passenger train has recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction." In *Eaton v. Erie R'y Co.*, 51 N. Y. 551, the train was standing with the rear car nearly over the crossing, and the plaintiff attempted to cross with a horse and buggy, and it was sud-

denly backed upon him. It is said in the opinion: "The plaintiff had a right to expect that some previous warning would be given that the train was about to back, to put him in fault. The measure of precaution which prudence suggests is in due proportion to the probability of danger." If, by the negligence or omission of those in charge of the train, the plaintiff's vigilance was allayed, they are not at liberty to impute the consequence of their acts to his want of vigilance; and if their acts brought him within the boundaries of peril, they must answer for the results: *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 72; 78 Am. Dec. 322. If, in this case, those in charge of the train allayed the vigilance of the deceased by running the train over the crossing and on towards the north in such manner as to cause him to believe that it would continue and not return, and immediately run back over the crossing, they are not at liberty to impute the consequence of such act to his want of vigilance; and if such unexpected return brought him into peril, they must answer for the result.

It is contended that the train did not return without warning or signal, but that the bell was rung constantly on its return. It is true that many of the defendant's witnesses testified that the bell was so rung, but many of the plaintiff's witnesses testified that they did not hear it, and some of them were so situated that they would have heard it had it been rung. This certainly made a conflict of evidence and a question for the jury. But if the bell was rung on the engine at the other end of the train, if he did not see the train and did hear the bell he could not have known with any certainty whether it was rung for the going forward or the return of the train. On this appeal we must assume that no warning or signal was given. As said before, it would seem that, under the circumstances, there ought to have been some one on the rear car, or in some position where he could have seen that no one was about to cross the track before it was backed down over the crossing, to give the deceased timely warning, and to signal the train to stop if there was danger of a collision. This may not be important as effecting the question of the defendant's negligence, as its negligence seems to have been established by other facts as well, but it may be important as affecting the question of the negligence of the deceased. It can readily be seen that the peculiar circumstances of this case make the contributory negligence of the deceased a question for the jury, and not for the court to decide as a question of

law; nor would it be a question of law to decide that the deceased was not guilty of such negligence, until the jury had passed upon the disputed facts upon which such a decision must depend. The court erred in directing a verdict for the defendant.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

QUESTION OF NEGLIGENCE IS FOR THE JURY, WHEN AND WHEN NOT: *City Ry Co. v. Lee*, 50 N. J. L. 435; *ante*, p. 798; it is always a question for the jury unless the facts are uncontradicted and the inferences to be drawn from the same are clear: *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151, and note 162.

IT IS THE DUTY OF PERSONS ABOUT TO CROSS A RAILROAD TRACK to stop, look, and listen, whenever danger is to be apprehended: *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note; and likewise it is the duty of the railroad company to give warning of approach of trains where danger is to be apprehended: *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570; 5 Am. St. Rep. 559, and note.

ANDERSON v. SLOANE.

[72 WISCONSIN, 566.]

JUDGMENTS AND EXECUTIONS THAT HAVE BEEN SET ASIDE ARE NO DEFENSE to the parties who had them entered and issued, in an action subsequently brought to recover damages for the seizure of property under said executions.

MEASURE OF DAMAGES FOR WRONGFUL SEIZURE OF PROPERTY UNDER EXECUTION. — Where property of the plaintiff, consisting of a stock of goods in a store, has been seized under executions which the defendant caused to be issued, acting in good faith and without malice or intent to oppress the plaintiff, and afterwards returned to the plaintiff or his assignee, the plaintiff having in the mean time made a voluntary assignment for the benefit of his creditors, the jury, in an action to recover for such seizure, should, in assessing the damages, be restricted to these items: 1. Interest on the value of the goods seized during the time they were held by the sheriff, or, at the option of the plaintiff, in lieu of such interest, the value of his business during that time; 2. Any depreciation in the value of the goods during that time; 3. Any expenses to which the plaintiff was put in obtaining a return of the goods, including what he was obliged to pay for costs in the illegal judgments, and the alleged sheriff's fees charged for executing the illegal executions, expenses to which he had been put by way of rent of the store and clerk's hire while the defendant was in possession of the store, and money that he was compelled to expend for counsel and attorney's fees in the proceedings to set aside the illegal judgments and executions. But no damages should be allowed for any supposed loss of profits from the interruption of the

plaintiff's business for any time after the goods were restored to him or his assignee, for any loss that happened to him by reason of his assignment, nor for injury to his feelings.

ACTION to recover damages. The opinion states the case.

S. U. Pinney and A. L. Sanborn, for the appellants.

Quarles, Spence, and Dyer, and M. P. Wing, for the respondent.

TAYLOR, J. This action was commenced to recover damages for seizing a stock of goods of the plaintiff upon certain executions issued upon judgments entered upon warrants of attorney to confess judgments signed by the plaintiff in favor of Sloane & Co. and John V. Farwell & Co. There were two executions issued, for the aggregate sum of \$5,159.98. By virtue of these executions the sheriff of La Crosse County levied upon the stock of goods of the plaintiff of the alleged value of twenty-seven thousand dollars, and the sheriff closed the doors of the store, and held the goods by virtue of such seizure and the possession of said store for the period of twenty-six days. At the expiration of that time the claims of the said Sloane & Co. and Farwell & Co., together with the costs of the sheriff upon said executions and the costs included in the several judgments, were satisfied, and the goods were returned to the assignee of the plaintiff, he having before that date made a voluntary assignment of all his property for the benefit of his creditors.

Before the claims of Sloane & Co. and Farwell & Co. were satisfied, the plaintiff in this action made a motion in the circuit court of La Crosse County to set aside and vacate the judgment and execution in the case of *Sloane v. Anderson*, on the ground that the same were void for irregularities in entering the same, and the circuit court had denied the plaintiff's motion. From the order denying such motion, the plaintiff appealed to this court, and upon such appeal this court reversed such order, and directed the circuit court to enter an order vacating and setting aside both the judgment and execution: See *Sloane v. Anderson*, 57 Wis. 123, 137.

In the present action the plaintiff made all the members of the firms of Sloane & Co. and Farwell & Co. defendants, as well as their respective attorneys. The sheriff was not made a party.

The complaint in this action alleges that certain of the defendants were members of and composed the firm of W. and J.

Sloane; that other defendants named were members of and composed the firm of John V. Farwell & Co.; alleges the membership of the firms of the respective attorneys of said Sloane & Co. and Farwell & Co., who acted for them in entering the judgments and causing executions to be issued thereon; that they were authorized to act for such firms, respectively, and do the things complained of by the plaintiff. The complaint further alleges that the plaintiff, at the time said executions were issued and his stock seized thereon, was a prosperous merchant, carrying on a large retail business, and that his annual cash sales for the previous year exceeded fifty-two thousand dollars, from which he received a net profit of at least five thousand dollars; that he was in good credit, and was worth fifteen thousand dollars over and above his debts and liabilities, and that the stock of goods in his store was worth twenty-seven thousand dollars. The complaint then alleges that no part of \$3,378.28 owing to the defendants W. and J. Sloane & Co. was due at the time the judgment was entered and execution issued thereon, except the sum of \$663.03, and interest. It then alleges the entry of judgment for the whole sum with interest and \$199.14 costs, and that execution for that sum and interest was issued on the judgment; and that on the same day, of the debt owing to John V. Farwell & Co. of \$1,757.08, no part was due except the sum of \$439.27, and that judgment was entered up and execution issued for the whole amount, together with \$117.41 costs. The remainder of the complaint is as follows:—

“That there was no affidavit as to the amount due or to become due, attached to the complaint or judgment roll in said proceedings, as required by law. That the said pretended judgment was entered for the entire indebtedness, when only a portion, to wit, the sum of \$439.27 and interest, was due, and the warrant of attorney or authority for confessing judgment did not authorize the entry of judgment for any amount before the same became due. That said judgment was irregular and void. That said court commissioner had no jurisdiction or authority to sign the same.

“That on the said twenty-eighth day of September, 1881, the said defendants Cameron, Losey, and Bunn, by order and direction of said Curtis H. Reny, and by order and direction of said defendants W. and J. Sloane, and John V. Farwell & Co., wrongfully and unlawfully issued executions out of said circuit court on said several judgments for the

full amount of damages and costs aforesaid, to the sheriff of La Crosse County, which said executions, though regular in form so as to protect the said sheriff, were unauthorized and void. That Mark M. Buttles, the then sheriff of La Crosse County, on said twenty-eighth day of September, 1881, under and by virtue of the said executions, which were both delivered to him at the same time, and under and by virtue of the orders and directions of the said defendants Cameron, Losey, and Bunn, and of the defendants Curtis H. Remy, and W. and J. Sloane, and John V. Farwell & Co., and in the absence of this plaintiff from the city of La Crosse, he having left this city at the express request of the said defendant Curtis H. Remy, who was acting in behalf of said defendants W. and J. Sloane and John V. Farwell & Co., the said sheriff, without the plaintiff's consent, levied upon, seized, and took possession of the entire stock of goods, fixtures, and furniture and store of this plaintiff, occupied by him under lease, and situated on the southwest corner of Main and Third streets in the city of La Crosse, and seized and took the keys of said store, and turned out and caused to be removed from said store the clerks and customers of this plaintiff, and shut up the said store, and stopped all trades and sales therein for and during the space and time of twenty-five days, to his damage in the sum of five thousand dollars, the said stock of goods, and fixtures and furniture being then and there worth the sum of thirty thousand dollars.

"That in consequence of said wrongful levy and seizure and closing up of plaintiff's store, other creditors of this plaintiff, in order to protect their interests and secure their claims against this plaintiff, commenced several suits, proceedings, and attachments, and obtained and entered judgments against this plaintiff, which suits, proceedings, and judgments would not have been had or brought but for the said wrongful acts of the defendants, and this plaintiff was thereby put to great cost and expense over and above his indebtedness, to wit, the sum of five hundred dollars. That said wrongful acts of the defendants, in entering said judgments and seizing said stock of goods and closing said plaintiff's store, injured the credit of this plaintiff and his business, and resulted in a great loss in the profits of his business, and prevented him from selling his said goods and stock at a profit, or at all; and, for the purpose of protecting himself and his creditors, he was, in consequence of said acts of the defendants, compelled to and

did on the twenty-ninth day of September, 1881, make an assignment of all his property to John M. Holley, assignee, for the benefit of all his creditors. That had it not been for the said wrongful acts of the said defendants in entering judgments, issuing executions, and seizing the plaintiff's stock of goods, the plaintiff could and would in the regular course of business have paid all his indebtedness, without cost or expense. That the costs of said assignment, including assignee's fees, attorney's fees, and extra employees, amounted to the sum of three thousand dollars, which amount was paid by the plaintiff or incurred by him. That for the purpose of raising funds to pay off the indebtedness of the plaintiff, the said assignee was compelled to and did sell goods and stock in trade of the plaintiff, which cost the sum of twenty-two thousand dollars, at a loss of five thousand dollars, when, in the regular course of trade and business, the plaintiff could and would have made a profit of four thousand four hundred dollars; to his damage of nine thousand four hundred dollars. That by reason of said wrongful acts of the defendants, and the injury to his credit and business, his annual sales have been reduced from fifty-two thousand dollars to twenty-six thousand dollars per year; to his damage five thousand dollars. That the said John M. Holley, assignee of the plaintiff, was compelled to pay and did pay to the defendants Cameron, Losey, and Bunn upon said executions, in order to obtain possession of said goods and stock in trade and store of this plaintiff, the sum of \$5,883.23, \$572.15 of which sum was costs and sheriff's fees on said illegal judgments and executions.

"That afterwards, and before the commencement of this action, the judgments and executions aforesaid were, by order of the circuit court of La Crosse County, by direction of the supreme court of this state, duly set aside and vacated. That afterwards, and before the commencement of this action, the said John M. Holley duly assigned and transferred to the plaintiff all claims and demands and rights of action arising or growing out of the transactions and payments hereinbefore set forth; and that the said plaintiff has settled with his creditors, except the defendants W. and J. Sloane and John V. Farwell & Co., and the said assignee has been duly discharged. That before the commencement of this action, the plaintiff duly demanded of said defendants Cameron, Losey, and Bunn the said sum of \$5,883.23, paid by his said assignee to them as

aforesaid, and they refused to pay the same, or any part thereof.

"That plaintiff's credit and business has been injured and damaged by the aforesaid unlawful acts of the defendants in the sum of at least ten thousand dollars.

"The plaintiff further shows unto the court and alleges that the defendant Curtis H. Remy, as attorney of the defendants, constituting the firm of W. and J. Sloane, by falsely representing that the said firm had lost a certain note theretofore given them by this plaintiff, and that he was creditman of said firm, procured the signature of this plaintiff to the notes upon which said judgment in favor of the members of said firm against the plaintiff was rendered, without knowledge on the part of the plaintiff that said notes contained a warrant of attorney; and as agent and attorney of the defendants constituting the firm of John V. Farwell & Co. falsely represented that he was simply the friend of the creditman of John V. Farwell & Co., and that said firm desired their account to be represented by notes, procured the signature of plaintiff to the notes running to John V. Farwell & Co., on which the judgment in favor of that firm, and against the plaintiff, was entered. This plaintiff alleges that he did not know that said notes contained a warrant of attorney authorizing the entry of judgment without notice to plaintiff, and that all the defendants, except the defendants Cameron, Losey, and Bunn, who acted as agents and attorneys of the other defendants in obtaining the said notes, causing judgments to be entered thereon, and executions to be issued upon said judgments, and the plaintiff's property to be seized and held on said executions, willfully and maliciously intended to overreach and oppress this plaintiff, and break up his business. That the acts and doings of the defendant Curtis H. Remy were, before the commencement of this action, fully known to and were ratified by the defendants constituting the firms of W. and J. Sloane and John V. Farwell & Co."

The defendants answered, admitting the partnership of the respective parties, as stated in the complaint, and the authority of the several attorneys to act on behalf of said firms in the premises, as also alleged in the complaint. They admit the entry of the judgments and the issuing of the executions, as alleged in the complaint, and the amounts due and to become due at the times said judgments were entered up and executions thereon issued; but allege on information and

belief that the judgments were regular and lawfully entered up, and that the executions were fair and regular on their face, and lawfully issued on said judgments. They also admit that such executions and judgments were afterwards set aside by the order of the circuit court of La Crosse County. They deny that at the time such judgments were entered and executions issued the plaintiff was a prosperous merchant, and allege that his credit was then impaired, and his failure imminent; that on the twenty-sixth day of September, 1881, a judgment by confession had been entered in favor of O. R. Keith & Co. against the plaintiff for \$1,137.40, and execution had been issued thereon. The defendants allege that they were not jointly interested in the judgments and executions entered and issued in their favor, respectively, but that each proceeded in their own behalf. They admit that the plaintiff made a voluntary assignment, as alleged in his complaint, but deny that it was necessitated or caused by the acts of the defendants. They allege that the seizure of the plaintiff's property under and by virtue of said executions was made in good faith, and for the sole purpose of securing the payment of the sums of money mentioned therein, then due and owing to them, respectively, and which, owing to the insolvent condition of said plaintiff, they were in great peril of losing.

The defendants then allege that after the seizure of said goods, they released said goods, and delivered them to the assignee of the plaintiff, in consideration of certain notes delivered to them by said assignee, and that such arrangement was made with the assent of the circuit court, obtained by such assignee for that purpose, and that such surrender was made by the defendants, and the notes received for the respective sums due to them, with the full knowledge and assent of the plaintiff, and under an agreement with the said plaintiff and his assignee that all claims of the plaintiff growing out of such seizure of his property upon such executions should be considered fully satisfied and discharged thereby.

The case was tried in the circuit court, and resulted in a judgment in favor of the plaintiff for the sum of \$10,572.15 damages, and the costs of the action. From this judgment the defendants appeal to this court.

The principal grounds of error alleged are as follows: 1. It is claimed that the judgment should have been in favor of the defendants, for the reason that the judgments and executions upon and by virtue of which the plaintiff's goods were seized

were simply voidable and not void, and until set aside were a perfect justification to the sheriff executing the same, and to the defendants in whose favor they were issued; 2. That upon the question whether there had been an accord and satisfaction by agreement between the plaintiff and defendants for any damages the plaintiff might have suffered by the seizure of his goods upon the executions, if they should be held void, the verdict should have been in favor of the defendants; 3. That the rule for assessing the damages, if the plaintiff was entitled to recover any, as submitted to the jury by the learned circuit judge, was erroneous, and contrary to law.

Upon the first point made by the learned counsel for the defendants, we think the circuit court ruled correctly. The fact appeared upon the trial that these judgments, and the executions issued thereon, had been set aside by the circuit court, either because they were void or voidable, long before this action was commenced. In such case, it is immaterial for what cause they were set aside. When once set aside, they can no longer be set up by the party causing the same to be entered and issued as a defense for anything done under them. Whether they would protect the sheriff for what was done by him before they were set aside and vacated, is not a question in this case. It clearly appears from the opinion of this court in *Sloane v. Anderson*, 57 Wis. 123, that the judgment and execution in that case was set aside because the judgment was entered for more than there was due to the plaintiffs, and because there was no sufficient affidavit of indebtedness as required by the statute. These defects in the proceedings have always been held sufficient grounds for setting aside a judgment on confession in this court: See *Dilley v. Van Wie*, 6 Wis. 206; *Blaikie v. Griswold*, 10 Id. 293; *Second Ward Bank v. Upman*, 14 Id. 596; *Van Steenwyck v. Sackett*, 17 Id. 645; *Remington v. Cummings*, 5 Id. 138, 142. The courts of this state, on motion, exercise an equitable supervision and control over judgments entered upon warrants of attorney: *Reid v. Case*, 14 Id. 429; *Jones v. Keyes*, 16 Id. 562; *Brown v. Parker*, 28 Id. 21; *McCabe v. Sumner*, 40 Id. 386. The judgments and executions having been set aside in these cases, there can be no defense to the parties plaintiff in them for the acts done under them: *Simpson v. Hornbeck*, 3 Lans. 53, 55; *Williams v. Riel*, 5 Duer, 601, 603; *Holloway v. Turner*, 6 Q. B. 928, 929.

The second point made, it seems to us, was, under the evidence, a mere question of fact for the jury; and the jury under

proper instructions from the court have found against the claim of the defendants. This question, it appears, was submitted to the jury upon an instruction asked by the learned counsel for the defendants, and as the evidence upon the claim made by the defendants was not so clear as to justify the court in taking the question from the jury, the verdict must be taken as conclusive upon the parties.

The remaining question is, whether a proper rule of damages was laid down by the learned circuit judge on the trial of this action. To determine that question, it becomes necessary to understand just what the nature of the action is, as disclosed by the evidence on the trial. In the complaint there were allegations which, if established by the evidence on the trial, would probably have brought the case within the rule of damages established in cases for malicious prosecution. After all the evidence was before the court, the learned circuit judge very properly held that there was no sufficient evidence of malice on the part of the defendants to justify the jury in giving damages on that ground. The learned judge on the trial, after the plaintiff had introduced all his evidence, and in reply to the counsel for the defendants, who stated that the plaintiff was claiming punitive damages, made the following statement: "They have now rested their case, and I do not think there is a shadow of testimony that would warrant the recovery of punitive damages in this case; but I am inclined to think for the present that they may recover the actual damages if they sustained any, growing out of this levy, if it has not been settled." In his instructions to the jury the learned judge said, speaking of the claim for exemplary damages: "The plaintiff would have no right to recover, in any event, exemplary damages by way of punishment of the defendants, unless he established by the testimony substantially what is alleged in the complaint, that these judgments were entered and executions issued and levied maliciously, for the purpose of overreaching and oppressing the plaintiff, and breaking up his business. I do not think there is any evidence tending to establish this claim. It is for the court to withdraw any claim from a jury when there is no evidence tending to prove it."

The evidence in the case, as said by the learned circuit judge, excludes from it all considerations of malice or intent to overreach or oppress the plaintiff by the action of the defendants. The case must therefore be treated as an honest,

but illegal, attempt on the part of the defendants to collect their claims of the plaintiff by due process of law. They must be treated as having acted in good faith, and under the advice of at least very reputable attorneys of this court.

In this view of the case, we are constrained to hold that a proper rule for assessing the damages of the plaintiff was not adopted on the trial. Under the instructions of the court, the plaintiff was allowed to recover as damages,—1. The attorney's fees and commissions included in the judgments of confession, and paid by the plaintiff in order to get a return of the property levied upon; 2. The expenditures of the plaintiff for the service of his attorneys in the circuit and supreme courts, in getting the judgments and executions set aside; 3. The whole expenses of the assignee under the assignment, including a large sum claimed to have been paid by the assignee, in conducting and closing up the assignment, for attorney's fees; 4. The probable profits the plaintiff would have made, from the time of the seizure of his stock of goods until the end of one year after the remnant of the goods were delivered to him by the assignee; 5. For loss because the assignee was forced to sell the goods not in the usual course of trade. The court also submitted to the jury that they might, in their discretion, allow damages for injury to the feelings of the plaintiff. The jury found a verdict for the plaintiff for the sum of \$10,572.15. They stated that \$3,000 of this was for loss of profits during the time specified; \$572.15 for the attorney's and sheriff's fees included in the judgments and on the executions. They did not find anything as compensation for the plaintiff's injured feelings, so that the \$7,000 must have been allowed for the expenses of the assignment, and for loss on the goods by forced sale by the assignee. The counsel for the defendants excepted on the trial to the evidence offered tending to prove loss of profits, also to the evidence of the expenses of the assignment, the evidence as to the loss by forced sale of the goods by the assignee, and his expenses for attorney's fees in executing his duties as assignee, as well as to the instructions of the court to the jury upon these questions.

As was said by the learned circuit judge, the action was for the commission of a trespass by the defendants in seizing and holding the goods of the plaintiff under the irregular and void executions for the period of twenty-six days, and, substantially, that it was a trespass without malice or any illegal design on the part of the defendants. Under these circumstances, we

are clearly of the opinion that the latitude allowed by the learned circuit judge for assessing damages was unwarranted, and worked great injury to the defendants. This case, as submitted to the jury upon the evidence, is substantially the same as to facts as the case of *Beveridge v. Welch*, 7 Wis. 465. The only difference between the case of *Beveridge v. Welch*, *supra*, and the case at bar is in the form of the action, and the fact that in the *Beveridge* case the sheriff was made the defendant, instead of the plaintiffs in the execution. In *Beveridge v. Welch*, *supra*, the action was replevin for the goods, and to recover damages for their wrongful seizure and detention. The grounds of the action in that case were such that the execution in the hands of the sheriff furnished him no protection, and he was therefore liable to the same extent for any damages which his acts caused the plaintiff as the plaintiffs in the execution would have been had they directed the acts to be done by the sheriff. In that case, the sheriff took the property of the plaintiff, not upon an execution against him, but upon an execution against a third person. There was enough evidence in that case to exonerate the sheriff from all malice or intentional wrong-doing in the case, but the jury found he had made a mistake in seizing the property of the plaintiff instead of the property of the defendant in the executions, and he was therefore held liable to respond in damages to the plaintiff; and the material question was as to the damages the plaintiff was entitled to recover. In that case, the sheriff had seized goods of the plaintiff of the value of six thousand dollars, and had detained them from the plaintiff sixteen days. The goods were a stock of goods kept by the plaintiff in a country store. The plaintiff recovered five hundred dollars damages for the taking and detention of the property by the defendants. The goods themselves were delivered to the plaintiff by virtue of the writ of replevin. In reversing that judgment, this court said: "The jury gave the respondent five hundred dollars damages for the wrongful taking and detention of the goods by the sheriff, who had them in his possession for the period of not exceeding sixteen days. The stock of merchandise taken was such as is usually kept in a country dry-goods store, and was valued by the jury at six thousand dollars. The goods were not removed from the building, were carefully handled, and placed in a pile in the store, where they remained until the respondent replevied them, or obtained possession of them by commencing this action. The

respondent was deprived of the use and control of his goods for sixteen days, and according to the most favorable rule, the measure of damages in this case would be the legal interest upon the value of the property while it was out of his possession, and compensation for any depreciation in the value of the goods replevied, and the necessary expense of placing the goods in their proper place"; citing for authority for this rule *Graves v. Sittig*, 5 Wis. 219; *Morris v. Baker*, 5 Id. 389; and *Gordon v. Jenney*, 16 Mass. 465.

The facts of the case are almost identical with the facts in the case at bar. In this case, the defendants caused to be seized upon their executions, not the property of a stranger, but the property of the defendant in the executions, — a stock of goods worth twenty-seven thousand dollars. They did not remove them from the shelves in the store, but closed the store, and held them without injury for twenty-six days, and then delivered them to the assignee of the plaintiff, at the request and with the assent of the plaintiff. In both cases, the evidence disclosed that the defendants acted without malice or intent to oppress or injure the plaintiffs; in the former case under a mistake of fact, and in the present case under a mistake of law.

It is evident that if the court laid down the proper rule for assessing the damages in the case of *Beveridge v. Welch*, *supra*, then the rule laid down by the learned circuit judge in this case is radically wrong. It is urged, however, on the part of the learned counsel for the respondent, that the rule, as stated in the *Beveridge* case, has been greatly modified, if not abolished, by this court in subsequent decisions; or if not, that the facts in the case at bar are not similar to the facts in that case, and so the rule there laid down has no application. We think it will be found by an examination of the subsequent cases in this court, which are said to establish a different rule from that in the *Beveridge* case, that they are all cases dependent upon an entirely different state of facts, and that in none of them has the soundness of the decision in the *Beveridge* case been questioned. The cases relied upon in this court as changing the rule in the *Beveridge* case are *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318; *Jolly v. Single*, 16 Id. 280; *Kinney v. Crocker*, 18 Id. 74; *Gates v. N. P. R. R. Co.*, 64 Id. 71; and *Poposkey v. Munkwitz*, 68 Id. 322. That the cases of *Shepard v. Milwaukee G. L. Co.*, *Jolly v. Single*, and *Kinney v. Crocker*, *supra*, were not supposed by this court to have

changed the rule as laid down in the Beveridge case, upon a case presenting similar facts, is evident from the subsequent decision of this court in *Bonesteel v. Orvis*, 22 Wis. 523, 525, where that case is cited in the opinion of this court as establishing the proper rule upon the facts stated. The subsequent cases of *Gates v. N. P. R. R. Co.* and *Poposkey v. Munkwitz*, *supra*, were cases dependent upon an entirely different state of facts.

We do not see that the facts in the case, so far as they relate to the acts of the defendants, differ from those in the Beveridge case. There being no malice or wrongful intent to oppress the plaintiff, they proceeded to collect their debts, as they supposed, in a lawful way under the advice of learned counsel, and ordered the goods of the plaintiff seized upon what they were advised were valid judgments and executions. It turns out that, upon an examination of such judgments and executions by this court, it was adjudged that they were irregular and void. The justification for taking the goods fails, but in the absence of malice or bad motives they stand precisely in the same position that the sheriff did in the Beveridge case, and it seems to us that because results to the plaintiff followed in this case which do not appear to have followed in the Beveridge case, that does not change the rule. That the rule laid down by this court in the Beveridge case is fully sustained by the great weight of authority, by the decisions of other courts, is clearly established by the numerous authorities cited by the learned counsel for the appellants in the very able brief presented by them on the hearing of this appeal, some of which are here cited: *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 211; 41 Am. Rep. 19; *Blair v. M. & P. du C. R. R. Co.*, 20 Wis. 262; *Masterton v. Mount Vernon*, 58 N. Y. 391, 396; *Higgins v. Mansfield*, 62 Ala. 267; *Holliday v. Cohen*, 34 Ark. 707, 710, 711; *Heath v. Lent*, 1 Cal. 412; *Tobin v. Post*, 3 Id. 373; *Oviatt v. Pond*, 29 Conn. 479; *Water Lot Co. v. Leonard*, 30 Ga. 560, 567, 577; *Green v. Williams*, 45 Ill. 206; *Cilley v. Hawkins*, 48 Id. 308; *Chicago City R'y Co. v. Howison*, 86 Id. 215; *Glass v. Garber*, 55 Ind. 336; *Western G. R. Co. v. Cox*, 39 Id. 260; *Campbell v. Chamberlain*, 10 Iowa, 337; *Lowenstein v. Monroe*, 55 Id. 82; *Washington Ice Co. v. Webster*, 62 Me. 341, 362; 16 Am. Rep. 462; *Boyd v. Brown*, 17 Pick. 453, 461; *Brown v. Smith*, 12 Cush. 366; *Simmer v. St. Paul*, 23 Minn. 408, 410; *Cincinnati v. Evans*, 5 Ohio St. 594, 605; *Bates v. Clark*, 95 U. S. 209; *Smith v. Condry*, 1 How. 28;

Bazin v. Steamship Co., 3 Wall. Jr. 229, 242; *Wallace v. Finberg*, 46 Tex. 36, 48; *Miller v. Jannett*, 63 Id. 82; *Weeks v. Prescott*, 53 Vt. 73, 74; *Dennis v. Stoughton*, 55 Id. 371, 377.

Many more cases might be cited, but it seems to us that those cited are quite sufficient to support the rule stated in *Beveridge v. Welch* and *Bierbach v. Goodyear Rubber Co.*, *supra*, that in an action to recover for an illegal seizure of goods of the plaintiff, when no malice is proved or any intent to oppress the party whose goods are seized, no damages can be assessed for supposed loss of profits from the interruption of the business of the plaintiff. We think the verdict of the jury in this case is very convincing proof that the rule of this and other courts in limiting the range of the jury in the assessment of damages in cases of this kind to such as can be readily ascertained by certain proofs, and not permitting them to wander into matters which are purely speculative, and which may or may not have been occasioned by the acts of the defendants, is a most salutary rule. The plaintiff having, immediately after the seizure made by the defendants, of his own motion made a voluntary assignment, he cannot charge any losses which may have occurred to him thereby to these defendants. We think it is purely a conjecture, and not a fact proved by the evidence in this case, that such assignment was caused by the acts of the defendants, or that it was not, under all the circumstances, the best thing for the plaintiff that such assignment was made. If it was not the best thing to do, the defendants are not responsible, as they did not do it or in any legal sense cause it to be done. If it was the best thing to do, then they ought not to be mulcted in damages because it was done. That the defendants cannot be charged with losses, if any, resulting from such assignment, seems clear to us. See *Walker v. Fuller*, 29 Ark. 448, 458, 459; *Donnell v. Jones*, 13 Ala. 490, 513; 48 Am. Dec. 59.

If, under any circumstances, the jury might consider, in assessing damages, that the business and trade of the plaintiff had been injured and interrupted by the acts of the defendants, we cannot see upon what grounds they are to be chargeable with the supposed loss of profits the plaintiff would have made after the goods had been returned to him, or how, in estimating such loss of profits, they were authorized to estimate the losses occurring within about two years after the goods had been returned to the plaintiff or to his assignee. The learned circuit judge appreciated the difficulties attend-

ant upon giving such latitude to the jury, and remarked on the trial, to the offers of evidence on the part of the plaintiff tending to show that his business had not been as successful after the return of the goods as before they were seized: "You cannot get any definite or strict rule to guide the jury, and it may be a question how far the party may suffer injury, and testimony must be taken on the question and submitted to the good sense of the jury." Damages which are so uncertain and indefinite, and which depend mainly upon the acts of the plaintiff himself, after the defendants have ceased to have any control over his property or his acts, are of too vague and indefinite a character to be estimated by the jury.

We think, in assessing the damages in this case, the jury should be restricted to the following items,—the goods seized having been delivered to the plaintiff long before this action was commenced, their value cuts no figure in the case except as they bear upon the other items of damages: 1. The plaintiff should recover interest on the value of the goods seized, from the time of the seizure until the same were delivered to the plaintiff or to his assignee; or, at the option of the plaintiff, in lieu of such interest, he may recover as damages the value of his business during said time; 2. For any depreciation in the value of the goods during the same time; and 3. For any expenses the plaintiff was put to in obtaining a return of the goods. This last item would include the sum of \$572.15, which he was compelled to pay for the costs included in the illegal judgments, and the alleged sheriff's fees charged for executing the illegal executions. It would also include any expenses to which the plaintiff had been put by way of rent or use of store and clerk's hire during the time the defendants had possession of the store. And under this item of expenses, we are inclined to hold that the plaintiff may recover any money he may have necessarily expended for counsel and attorney's fees in the proceedings to set aside the illegal judgments and executions. The learned counsel for the appellants have cited several cases in England and in the United States which hold that these expenses are not recoverable in an action of trespass for injury to the property of the plaintiff. These decisions go mainly upon the nature of the action, and rest upon the right to recover in the given form of action. In *Holloway v. Turner*, 6 Q. B. 929, 930, the court say that these expenses cannot be recovered in that action, but it is expressly stated that the plaintiff might recover such costs in a proper

form of action. The American cases cited proceed upon the same ground. In this state, and under the code, there seems to be no good reason why they may not be recovered in the same action, when the facts are properly stated in the complaint: See R. S., sec. 2647, subd. 1.

No damages should be allowed for injury to the feelings of the plaintiff. Injury to the feelings is not a legitimate item of damages in any action for an injury to personal property, when such injury is not malicious, and is not accompanied by insult: *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59. No damages should be assessed in consequence of the voluntary assignment, either for the expenses of the assignment or by supposed losses by forcing the goods upon the market, nor for loss of profits of business for any time after the goods were restored to the plaintiff or his assignee.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

LIABILITY OF OFFICER AND OTHERS FOR WRONGFUL LEVY OF EXECUTION: See Freeman on Executions, sec. 272, 273. If an officer violates his duty, either by making an excessive levy or by refusing to levy on the property pointed out by defendant, he is liable for such special damages as the defendant may incur thereby; but the process will not be invalid: *Barfield v. Barfield*, 77 Ga. 83.

MEASURE OF DAMAGES FOR WRONGFUL SEIZURE OF GOODS ON EXECUTION: See *Selden v. Cashman*, 20 Cal. 56; 81 Am. Dec. 93, and note. When a judgment is reversed under which an execution sale has been made, the measure of damages to defendant is, not what the property realized at forced sale, but its full value, and this though the property had been surrendered under a judgment which required the claimant to pay the demand or surrender the property: *Cleveland v. Tufts*, 69 Tex. 580.

NELSON, BY GUARDIAN AD LITEM, v. HARRINGTON.

[72 WISCONSIN, 59L.]

ACTION IS ONE SOUNDING IN TORT AND NOT UPON CONTRACT, when the complaint alleges as the *gravamen* of the action that the defendant disregarded his duty in the premises by negligently, wrongfully, and carelessly failing to make a proper diagnosis of the plaintiff's disease, and to prescribe proper remedies therefor, although it also alleges an implied contract of the defendant to treat the plaintiff in a skillful and proper manner.

PHYSICIAN OR SURGEON IS BOUND TO EXERCISE SUCH REASONABLE CARE AND SKILL as is usually possessed and exercised by physicians and surgeons in good standing, of the same system or school of practice, in the

vicinity or locality of his practise, having due regard to the advanced state of medical or surgical science at the time, where he holds himself out and accepts employment as such physician or surgeon, whether he has been duly licensed or not.

TO CONSTITUTE SYSTEM OF PRACTISE A SCHOOL OF MEDICINE, it must have rules and principles of practice in respect to diagnosis and remedies, which each member is supposed to observe in any given case.

CLAIRVOYANT PHYSICIANS ARE BOUND TO TREAT PATIENTS WITH ORDINARY SKILL and knowledge of physicians in good standing practicing in that vicinity, although, not having any fixed principles or formulated rules for the treatment of diseases, they cannot be regarded as constituting a school of medicine.

CLAIRVOYANT PHYSICIAN SUED FOR MALPRACTICE CANNOT BE HEARD TO CHARGE WITH NEGLIGENCE the patient's father, because the latter, with full knowledge of the defendant's methods of diagnosis and prescription, employed him to treat his son.

DEPOSITION, WHEN NOT ADMISSIBLE AS EVIDENCE IN CHIEF.—In an action against a physician for malpractice, a deposition of the plaintiff's father, taken in a suit brought by the latter against the defendant for loss of his son's services by the same malpractice, is not admissible as evidence in chief against the plaintiff.

REMARKS OF COUNSEL PROMPTLY DISAPPROVED BY COURT, AND COUNTERACTED by the charge of the court to the jury, are not ground for reversal.

ACTION to recover damages for the alleged malpractice of the defendant as a physician. The facts appear from the opinion.

Rogers and Hall, and G. W. Bird, for the appellant.

Pinney and Sanborn, for the respondent.

LYON, J. The question has been raised whether this is an action for the breach of a contract, or one sounding in tort for the alleged unskillful and negligent manner in which the defendant, as a physician, performed his duty to the plaintiff. Although the complaint alleges the implied contract of the defendant to treat the plaintiff in a skillful and proper manner, yet the *gravamen* of the action is alleged to be that the defendant disregarded his duty in the premises by negligently, wrongfully, and carelessly failing to make a proper diagnosis of the plaintiff's disease, and to prescribe proper remedies therefor. These allegations characterize the action. They show it to be solely for a breach of defendant's duty as a physician, founded upon his legal obligations as such, without reference to the implied contract. The contract is stated in the complaint as mere matter of inducement, and might as well have been omitted. It must be held, therefore, that the action is for the breach of duty,—the negligence and wrong,—

and not upon the contract: *Wood v. M. & St. P. R'y Co.*, 32 Wis. 398.

The general rule of law is, that a physician or surgeon, or one who holds himself out as such, whether duly licensed or not, when he accepts an employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed and exercised by physicians or surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the advanced state of medical or surgical science at the time. This rule is elementary. It has its foundation in most persuasive considerations of public policy. Its purpose is to protect the health and lives of the public, particularly of the weak or credulous, the ignorant or unwary, from the unskillfulness or negligence of medical practitioners, by holding such practitioners liable to respond in damages for the results of their unskillfulness or negligence. Citation of authorities to support the rule would be superfluous. It was substantially (perhaps not so fully) laid down and applied in *Gates v. Fleischer*, 67 Wis. 504, and is sustained by numerous cases, many of which are cited in the briefs of counsel on both sides.

The defendant is what is known as a clairvoyant physician, and held himself out, as other physicians do, as competent to treat diseases of the human system. He did not belong to, or practice in accordance with the rules of, any existing school of physicians governed by formulated rules for treating diseases and injuries, to which rules all practitioners of that school are supposed to adhere. The testimony shows that his mode of diagnosis and treatment consisted in voluntarily going into a sort of trance condition, and while in such condition to give a diagnosis of the case and prescribe for the ailment of the patient thus disclosed. He made no personal examination, applied no tests to discover the malady, and resorted to no other source of information as to the past or present condition of the plaintiff. Indeed, he did not profess to have been educated in the science of medicine. He trusted implicitly to the accuracy of his diagnosis thus made, and of his prescriptions thus given.

The general rule above stated requires of one holding himself out as a physician the exercise of the same skill and care as is ordinarily exercised by physicians in good standing who belong to the same school of medicine, and practice under the

same rule. To constitute a school of medicine under this rule, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case. Thus, any competent practitioner of any given school would treat a given case substantially the same as any other competent practitioner of the same school would treat it. One school may believe in the potency of drugs and blood-letting, and another may believe in the principle *similia similibus curantur*; still others may believe in the potency of water, or of roots and herbs; yet each school has its own peculiar principles and rules for the government of its practitioners in the treatment of diseases. Not so, however, with clairvoyant practice. True, the practice has but one mode of ascertaining what the disease is, and the remedy therefor. This mode has already been stated. But the mode in which a physician acquires a knowledge of his profession has nothing to do with his school or system of practice. One person may acquire such knowledge from certain books; another from certain other books, which perhaps teach different principles; still another from oral communications, as lectures, etc., or from experience alone; and still another from his intuitions when in an abnormal mental state; yet these differences do not necessarily constitute separate schools of medicine. The clairvoyant and the practitioners of the allopathic or homeopathic system may belong to the same school or system, provided they adopt the same principles, and observe the same rules of treatment. The methods by which a man acquires a knowledge of medical science is one thing, and the principles and rules which govern him in the practice of medicine is another and very different thing. This is just the difference between clairvoyant physicians as a class and the practitioners of a school or system of medical practice recognized in the general rule of professional ability above laid down. The regular physician of any school or system acquires his professional knowledge by the study of the general principles of the science, and applies such knowledge to each particular case as it arises, while the clairvoyant physician may have no such general knowledge, but believes himself especially and effectually educated to treat each particular case as it is presented to him, without reference to any particular system or school.

These observations dispose of the exceptions based upon the rejection of testimony offered to show that the defendant

practiced only as a clairvoyant physician. That was conclusively proved before, and the rejection of the testimony (if material under other circumstances) was of no importance. It should be observed that the answer of the defendant does not allege, and no testimony was given or offered to show, that clairvoyant physicians, as a class, treat diseases upon any fixed principles, or that rules have been formulated which each practitioner is supposed to follow in the treatment of diseases, as is the case with the schools or systems of medicine before mentioned. Clairvoyant physicians have a common mode of acquiring their knowledge of cases, but their methods of treatment may be contradictory and as numerous as are the practitioners, and no principle or rule of clairvoyant treatment be violated thereby.

The proposition that one holding himself out as a medical practitioner and as competent to treat human maladies, who accepts a person as a patient, and treats him for disease, may, because he resorts to some peculiar method of determining the nature of the disease and the remedy therefor, be exonerated from all liability for unskillfulness on his part, no matter how serious the consequences may be, cannot be entertained. The proposition, if accepted as true, would, as already suggested, contravene a sound public policy.

It matters not that the patient, or those who are responsible for him, know the methods of the practitioner. The responsibility for malpractice must still be laid upon the latter. It should be stated in this connection that the father of the plaintiff, who employed the defendant to treat his son, testified that he so employed him because he believed him to be a skillful physician; that he did not depend on the trance business, but on the defendant, the same as he would on any other physician; and that he believed in him because he had performed remarkable cures.

It follows that the court properly refused to give an instruction proposed on behalf of the defendant in these words: "If defendant was a clairvoyant physician, and professed and held himself out to be such, and the plaintiff and his parents knew it, and at the time he was called to treat the plaintiff both parties understood and expected that he would treat him according to the approved practice of clairvoyant physicians, and that he did so treat him, and in strict accordance with the clairvoyant system of practice, and with the ordinary skill and knowledge of that system, then the plaintiff cannot re-

cover, and your verdict must be for the defendant." Instead of the words, "with the ordinary skill and knowledge of that system," employed therein, it should read, "with the ordinary skill and knowledge of physicians in good standing, practicing in that vicinity."

Since the cause was argued, our attention has been called to the late case of *Wheeler v. Sawyer*, decided by the supreme judicial court of Maine, 1888. The statutes of Maine allow any person to practice medicine who has obtained from the municipal officers of the town in which he resides a certificate of good moral character. The plaintiff had such certificate, and practiced according to the principles and methods of those calling themselves "Christian Scientists." The case shows that practitioners of Christian Science use no medicines, and the plaintiff used none. It has now become common knowledge that their treatment is entirely mental. The action was for professional services. The objections to a recovery were, "that the so-called 'Christian Science' is a delusion; that its principles and methods are absurd; that its professors are charlatans; that no patient can possibly be benefited by their treatment." The court held all this immaterial, and said, in substance, that the patient got all he bargained for, and must pay for it the agreed price. There is no question of liability for malpractice in the case. On the contrary, the patient said he was improved under the treatment. Were the defendant in the present case authorized by law to practice medicine, and should a patient employ him to go into a clairvoyant state, and while in such state to tell him his malady and the remedy therefor, and agree to pay him a certain sum of money for such services, and were the defendant to render the service, doing the patient no injury, but a benefit rather, an action brought by the defendant to recover the stipulated compensation would be like the Maine case. We perceive no valid objection to a recovery by the plaintiff in either case. It goes without saying that we have here no such case for determination, and the Maine adjudication does not aid us.

We have not been referred to any case in the books of an action for malpractice against a clairvoyant physician (so called), and have found none. It is cause for surprise if no such case has arisen; for it is believed that this method has been employed quite extensively for many years in different parts of the country. Whether the absence of such cases is to be accounted for on the theory that the bar and public have

generally believed that this class of physicians are not legally responsible for want of skill, or because no member of it has been guilty of malpractice, or upon some other theory, is not here determined. Probably the fact that such cases have not come before the courts is not very significant. For want of them, however, we have been compelled to decide this case solely in the light of elementary rules of law, which perhaps furnish just as safe basis for judgment. In this connection, brief reference will be made to a case cited by counsel for defendant in his argument which then impressed us as being nearer in point than any other case cited. It is that of *McKleroy v. Sewell*, 73 Ga. 657. The court sustained an instruction to the jury in these words: "If a man sends for a doctor, and the doctor treats the patient, while he, the doctor is intoxicated, and the patient afterwards calls in said doctor, and continues to employ him, it would be a waiver of all objections to the doctor on account of his habit of intoxication." The language of this instruction (copied in the brief of counsel) seemed broad enough to cut off an action for malpractice. On looking into the case, however, we find the action, like the Maine case, was by a physician to recover for professional services. The court said: "Surely, one cannot object to a doctor's bill on account of past intoxication, when he keeps him as a family physician for years afterwards." It is strongly intimated in that case that the defendant might recoup in the action for damages caused by malpractice. If so, he might maintain an independent action for such damages. Hence the case is not in point, and throws no light on the present case.

The claim that the defendant belonged to and treated the plaintiff in accordance with the principles and rules of a particular school of medicine, and is relieved from liability in this action because thereof, having been negatived, the law applicable to the case may, we think, be correctly summarized as follows: One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation. Failing in this, he must be held liable for any damages proximately caused by unskillful treatment of his patient. This is simply applying the rule of liability to which all persons are subject who hold themselves out, and accept employment, as experts in any profession, art, or trade. The theory upon which an expert practices his profession, art, or trade, the sources from whence he derived his knowledge of it, the tools and appli-

ances he employs in the exercise of his calling, his methods of work, are not controlling considerations. The courts pass no judgment upon these matters. They look only to results. Thus, a person may rely entirely upon his genius or normal intuitions for some line of mechanical work, and hold himself out as an expert, and accept employment therein, without previous training or practice. The law holds him responsible if he does his work unskillfully, although he does the best he can. He takes the risk of the quality or accuracy of his genius or intuitions. On the same principle one who holds himself out as a medical expert, and accepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, in like manner takes the risk of the quality or accuracy of such influence or intuition. If these move him so imperfectly or inaccurately that, although he pursues the course of treatment thus pointed out or indicated to him, he fails to treat the patient with reasonable skill, he is liable for the consequences. The only difference in the two cases is, the mechanic acts under normal, and the physician acts under abnormal, influence or intuitions. The law does not concern itself with the quality of the mechanic's genius, or with the reality or nature of such alleged occult influence or intuition which controls the physician in his treatment of his patient. It only takes cognizance of the question, Did the practitioner or expert render the service he undertook in a reasonably skillful manner? That question, as applied to the defendant, the jury, upon sufficient proofs, have answered in the negative.

As to the alleged negligence of the defendant in his treatment of the plaintiff, it is enough to say that any person who is legally responsible for his conduct is liable for all damages suffered by another which are the proximate result of his negligence, or want of ordinary care. Of course, the defendant is subject to this rule; and here it may be observed that negligence cannot properly be imputed to the father of the plaintiff because he employed the defendant to treat his son, with full knowledge of the defendant's methods of diagnosis and prescription. At least, the defendant cannot be heard to charge the father with negligence in that behalf.

Perhaps a medical practitioner may protect himself from liability for unskillfulness by a special contract with his patient that he shall not be so liable; but in the absence of such

a contract, the practitioner must be held to his common-law liability. This rule was applied to a common carrier in *Conkey v. M. & St. P. R'y Co.*, 31 Wis. 619; 11 Am. Rep. 630. Dixon, C. J., there said: "I think, in the absence of special contract or agreement to the contrary, the true policy of the law, now as much as ever and even more, is, to adhere to the strict rules of liability on the part of common carriers established by the common law": p. 633. The reasons which there prevailed for adhering to that rule, and thus vindicating a sound public policy, are much more cogent in the case of the physician who deals with health and life instead of property.

The charge of the court to the jury, so far as we are able to perceive, is in strict accord with the views herein expressed. It is unnecessary to set it out at length. The testimony tends to show negligence and unskillfulness on the part of the defendant in his treatment of the plaintiff, and supports the verdict. Hence the judgment should not be disturbed unless some material error was committed on the trial. Some of the exceptions have already been determined. Those not passed upon will now be briefly considered.

The defendant offered in evidence a deposition of plaintiff's father taken in a case brought by the father against the defendant for loss of his son's services, etc., caused by the same malpractice here complained of. The court rejected the deposition as evidence in chief, but offered to receive it as evidence impeaching the testimony of the father who had theretofore been examined as a witness on the trial in behalf of the plaintiff. The ruling was clearly right. It was an offer to prove the statements of a witness made at another time and place in a different cause, as evidence in chief against the plaintiff. Of course, such evidence is inadmissible.

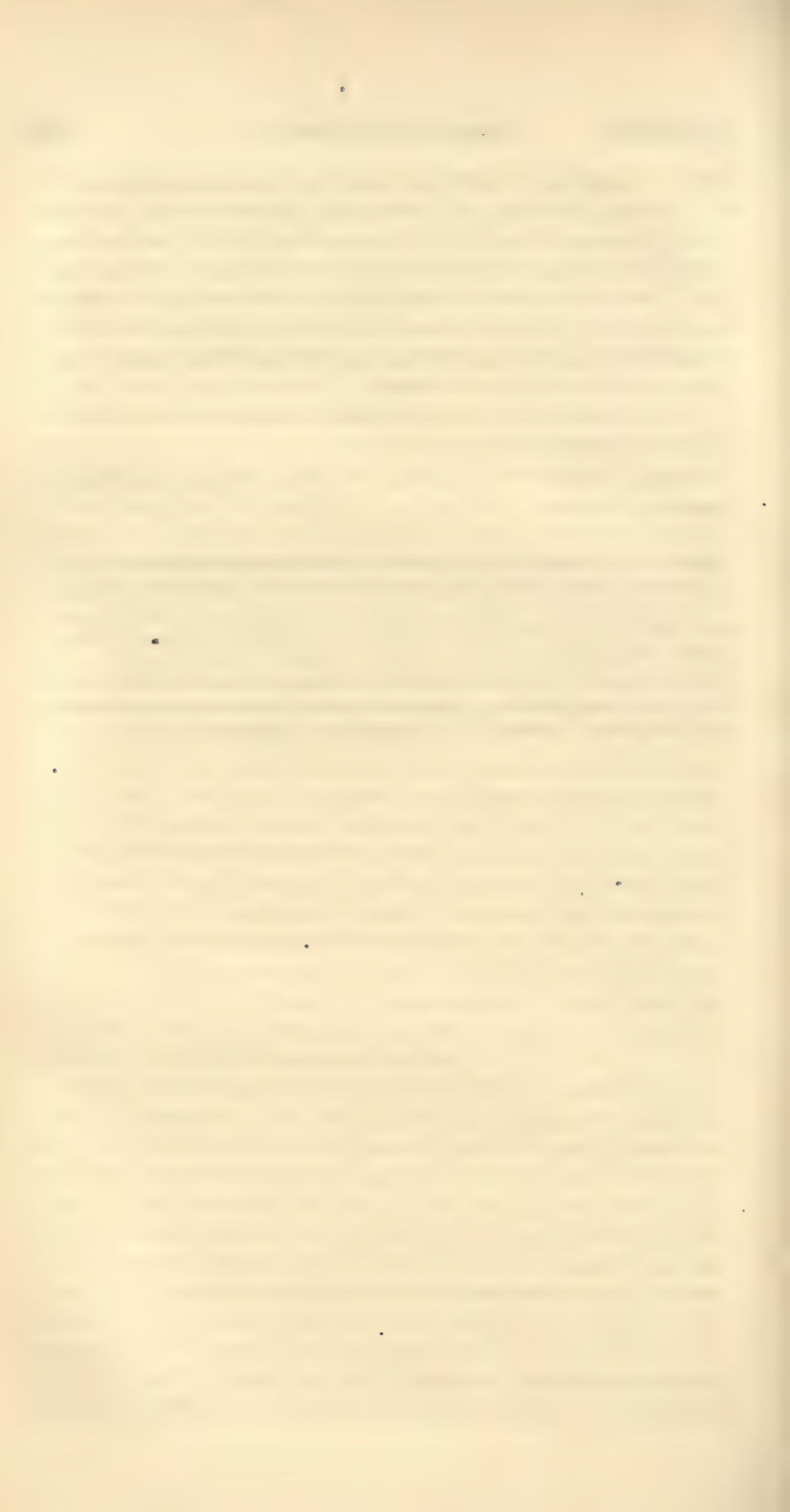
Certain objections were taken to remarks of counsel in argument. It was proved that the defendant placed the abbreviation "Dr." on his sign and prescriptions. Counsel said that when he did so he violated the laws of Wisconsin. The remark is not a very serious one at most, even if not true. We think, however, that it is a fair inference from the allegations of the answer and from the proofs that the defendant was not a regularly authorized medical practitioner under the laws of this state. The only other objection of this character is, that counsel for the plaintiff also commenced to comment to the jury on the fact that the defendant and certain physicians who were present in court had not been called by the defend-

ant as witnesses. The judge expressed his disapprobation of this line of remark, and instructed the jury in his general charge that they were to draw no presumptions from the fact that those persons were not called as witnesses. We are unable to perceive how the defendant could possibly be prejudiced by the remark of counsel thus promptly disapproved and counteracted. Besides, it is quite probable that counsel had the right to make such comment.

This disposes of all the exceptions upon which error is assigned adversely to the defendant.

By the COURT. The judgment of the circuit court is affirmed.

SKILL AND KNOWLEDGE EXACTED OF PHYSICIANS AND SURGEONS: Notes to *Howard v. Grover*, 28 Me. 97; 48 Am. Dec. 481-487; *Holtzman v. Hoy*, 118 Ill. 534; 59 Am. Rep. 392-398. Physicians and surgeons impliedly contract with their employers that they possess that reasonable degree of learning, skill, and experience, which is ordinarily possessed by the professors of the same art or science; and that they will use reasonable and ordinary care and diligence in the exertion of their skill, and the application of their knowledge: *Leighton v. Sargent*, 27 N. H. 460; 59 Am. Dec. 388.



INDEX TO THE NOTES.

CARRIER OF PASSENGERS, care exacted of carrier and passenger respectively, 830.

duty of, to give signals of departure of trains, 835.

duty of, to inform passenger of danger of alighting, 831, 832.

duty of, to inform passenger of danger from unexpected trains, 834.

duty of, to inform passenger that train has stopped at an unusual place, 833.

duty of, to inform passenger of change in the location of the train, 831.

duty of, to wake passenger on arrival at his point of departure, 836.

duty of, to warn passenger of unusual peril, 831, 834.

duty of, to warn passenger that he has taken a dangerous position, 835.

may assume that passengers will exercise ordinary intelligence, 830.

no duty to restrain passengers to protect them against their own neglect, 831.

passengers taking perilous position assume the risk, 835.

CLUB, members, liability of for goods ordered by another member, 162.

CONSPIRATORS, threats made to kill another person, when admissible evidence against, 20.

CONTEMPT OF COURT, instances of, 124.

CORPORATION, charter, reservation of power to alter, 721.

dissolution of, American decisions recognizing common-law doctrines concerning, effect of, 717.

dissolution of, at common law vested its personality in the sovereign, 717.

dissolution of, at common law vested its realty in its former owner, 717.

dissolution of, franchises which do not survive, 721.

dissolution of, franchises which remain notwithstanding, 722.

dissolution of, intervention of equity to prevent inequitable, effect of, 718.

dissolution of, its property thereupon becomes assets for payment of debts and distribution among stockholders, 717-726.

dissolution of, statutes preserving right of creditors and stockholders notwithstanding, 720.

franchise, grant of, subject to what condition, 721.

franchises of railroad corporations, what are, 723.

franchise obtained by corporation after its creation, 722.

franchise to be a corporation is not subject to sale nor transfer, 722.

grants to leave no reversionary estate in the grantor, 720.

repeal of charter of, cannot vest its property in the state, 719.

repeal of charter of, rights of creditors and stockholders after, 724, 725.

repeal of charter of, what franchises survive, 723-725.

CO-TENANCY, adverse possession between co-tenants, 583.

- CO-TENANCY**, entry by co-tenant under a conveyance purporting to be in severalty, 180.
- CREDITORS**, conveyance to defraud, relief of grantor from, 587, 588.
- CRIMINAL LAW**, intoxication, when lessens responsibility for crime, 21.
perjury, subornation of, procuring affidavit to be made by person of unsound mind, 330.
threats made by one defendant, when evidence against another, 20.
- DAMAGES** for breach of contract to marry may include injury to feelings, affections, and wounded pride, 534.
for mental suffering, 534-536.
in eminent domain proceedings in Kansas, 568.
mind or feelings, injury to, whether recoverable in action for breach of contract, 534.
- DEFINITION** of estate-tail after possibility of issue extinct, 429.
of estates-tail, general and special, 428.
of estates-tail, male and female, 428.
of mortgage, 32.
of privileged communication, 741.
of voluntary assignment, 160.
- DRUNKENNESS**, effect of, on accountability for crime, 21.
- EJECTMENT** between parties claiming from common source of title, 341.
legal title must be shown by plaintiff, 341.
- EQUITY**, parties *in pari delicto*, relief is granted to, where public policy requires intervention, 587.
parties *in pari delicto*, relief, when not granted to one against the other, 587.
- ESTATES-TAIL**, abolition of, in America by judicial construction, 430.
American statutes abolishing, 430.
classification of, 428.
definitions of, 428.
definition of tenancy in tail after possibility of issue extinct, 429.
derive their existence from the statute *de donis*, 428.
how barred, 431.
personalty, bequest of, to be held in, effect of, 429.
personalty cannot be held in, 429.
statutes transmuting into estates in fee, 431.
words creating, instances of, 429.
words sufficient to create in a deed or devise, 429.
- ESTOPPEL**, from permitting another to purchase without disclosing an equity, 662.
from suffering another to expend money on land, 662.
- EVIDENCE**, confessions, court must determine the admissibility of, 637.
hypothetical question to witness, propriety of, 495.
indorsement, parol to vary, 366.
of *bona fide* purchase, burden, on whom rests, 29.
oral, to explain equivocal writing, 816.
- EXECUTION**, damages, measure of, on reversal of judgment after a sale, 900.
liability of officer for wrongful levy under, 900.
redemption, right of, must be exercised in strict conformity to the statute, 469.
redemption, right of, where successive sales of the same property have been made, 469.

EXECUTION, sales under, transfer all title held by defendant on the day of the sale, 619.

sales under, vacation of, is a familiar proceeding, 786.

sales under, vacation of, equity will aid, when, 786.

sales under, vacation of, motion for, when the proper remedy, 786.

EXECUTORS, implied powers of, 817.

power of sale, when implied, 817.

FISHERY, right of public to engage in, on uninclosed flats, 793.

right of public to engage in, in lakes, rivers, and navigable waters, 793.

FRAUDULENT CONVEYANCES, grantor, induced to make by misrepresentations, 588.

grantor, instances where may be relieved from, 588.

party *in pari delicto* will rarely be relieved from, 587.

party not *in pari delicto*, when will be relieved from, 588.

post-nuptial settlements in favor of grantor's wife, 83.

relationship of the parties as a badge of fraud, 83.

GRANTOR, fraudulent, relief to, will rarely be granted, 587.

trust in favor of, when deed was induced by false promises, 645.

HABEAS CORPUS cannot perform office of writ of error, 515.

constitutionality of statute may be considered in proceedings under, 515.

defects in indictment, when fatal on, 515.

errors of law generally not reviewable on, 515.

HOMESTEAD, imperfect acknowledgment of conveyance of, 47.

lease for life, whether an abandonment of, 47.

HUSBAND AND WIFE, death of wife, husband's power over community property after, 138.

moneys of wife, conveyance made by husband in consideration of, 82, 83.

moneys of wife, reduced to husband's possession, 82.

moneys of wife, used by husband without promise to repay, 82.

preference by husband of wife, as a creditor, 83.

INFANT, action against, for deceit in representing himself to be of age, 419.

INDORSER WITHOUT RECOURSE does not warrant solvency of maker, 366.

exemption of from liability for non-payment by maker, 365.

general exemption of from the liability of an indorser, 365.

obligations of are those of a transferrer of paper payable to bearer, 365.

parol evidence to vary liability of, 366.

warranties implied against, 365.

INJUNCTION against trespasses, 546.

INSURANCE, application for, made out by agent who writes down false answers, 565.

JUDGE, waiver of disqualification of, 323.

JUDGMENT against one individually does not bind him as assignee in bankruptcy, 176.

against one individually does not bind him as guardian, 176.

against one individually does not bind him as trustee, executor, or administrator, 175.

against person in one capacity does not bind him in another, 175.

collateral attack on for error or irregularity not allowed, 137.

estoppel as to title acquired after issue joined, 478.

estoppel takes effect as of date of filing the complaint, 479.

JURISDICTION, consent of parties cannot confer, 323.

LARCENY, felonious intent, from what inferable, 23.

LIBEL, privileged communication defined, 741.

MANDAMUS by private citizen to compel performance of a public duty, 484-486.

private person, when may move for, 485.

relators in matter of public interest, who may be, 484.

special interest, when necessary in party seeking, 485.

to compel register of deeds to permit persons to make abstracts, 556.

voter, when entitled to writ of, 486.

MASTER AND SERVANT, fellow-servants, foreman in mine and the miners, 657.

fellow-servants, who are, 657.

negligence of servant, master, when answerable for, 759.

negligence of servant when not engaged in his master's work, 760.

MECHANICS' LIEN for grading street in front of private property, 471.

MENTAL SUFFERING, damages for anxiety of mind, 536.

damages for, in actions against telegraph corporations, 534.

damages for, in actions by parent for enticing child, 536.

damages for, in actions by parent for injury to child, 536.

damages for, in actions for assault and battery, 535.

damages for, in actions for breach of marriage contract, 534.

damages for, in actions for breach of contract, generally, 534.

damages for, in actions for breach of contract of carriage, 534.

damages for, in actions for false imprisonment and malicious arrest, 535.

damages for, in actions for libel and slander, 535.

damages for, in actions for negligence resulting in death, 535.

damages for, in actions for personal injuries, 536.

damages for, in actions for wrongful ejection from cars, 535.

damages for, in actions of tort, generally, 535.

damages for, in actions of unlawful detainer, 536.

damages for, must be the natural and proximate result of the wrong complained of, 536.

damages for, when it consists of anxiety or apprehension, 536.

MORTGAGE, defined, 32.

difference between its effect at law and in equity, 31.

is a conveyance of the title at common law, 32.

for what purposes deemed a conveyance of the legal estate, 32, 33.

redemption from, right of, when barred, 33.

relation of mortgagor and mortgagee, 31.

remedies of mortgagor against mortgagee, 33.

remedies to which mortgagee is entitled at law, 33.

remedies to which mortgagor is entitled at law, 33.

when becomes an unconditional estate, 32.

MUNICIPAL BONDS, irregularity in election to decide in favor of, 570.

NEGLIGENCE, contributory, absence of, whether must be averred, 411.

contributory, does not bar recovery when defendant was guilty of wantonness or willful neglect, 417.

NEGOTIABLE INSTRUMENT, presentation of, for payment, must be in a reasonable time, 648.

NOTICE, from knowledge of facts which should have excited inquiry, 129.

NUISANCE, damages for, measure of, where sickness of family has been caused by, 473.

PARTNER, payment of personal debt of, assent of other partners, from what inferred, 379.

payment of personal debt, defense to action to recover from payee, 380.

PARTNERSHIP, authority of each partner to dispose of firm property, 377.

bill of sale by one partner to secure his private debts, 408.

lien of execution against one of the partners, 408.

mortgage by one partner of firm assets for his private debt, 378.

payment of private debt of partner, payee when put on notice, 378.

payment of private debt of partner, recovery back from payee, 379, 380.

payment of private debt of partner, when fraudulent, 378.

payment of private debt of partner, with assent of his copartners, 378.

power of one partner to apply firm assets to payment of his private debts, 41.

power of one partner to dispose of firm assets, 41.

real estate of, conveyed by one partner to secure his private debt, 400.

transfer by one partner of firm assets to pay his private debts, 378.

use of firm assets by one partner, 378.

PATENT to public lands, conclusiveness of, 146.

PHYSICIANS, testimony of, as to mental capacity of a testator, 495.

PRINCIPAL AND AGENT, agent acting for both parties commits a fraud, 280.

agent acting for both parties, principal may rescind or repudiate the contract, 280.

agent cannot represent both parties, except with their consent, 280.

commission or gratuity given agent by the adverse party, 283.

conflict between, interests of, 279.

instances where agent's interests were deemed to so conflict with principal's as to entitle latter to rescind, 281.

ratification presumed from failure to repudiate agent's act, 141.

rescission by principal because agent represented adverse interests, or was not disinterested, 280-283.

PRINCIPAL AND SURETY, change in contract, release of principal by, 372.

change in employment of principal, release of surety by, 372.

PUBLIC LANDS, receiver's receipt, effect of as evidence, 226.

PUBLIC OFFICER, default of, in which official term deemed to have occurred, 640.

RAILROADS, bridges, right of employee to assume safety of, 450.

caboose car or freight train, liability for injury of passenger on, 457, 759.

REPLEVIN, judgment for return, when unnecessary, 100.

RESCISSION by principal because his agent was acting for adverse party, 280-283.

delay, when not fatal to right of, 671.

SALE, conditional, instances of, 262.

STATUTES OF LIMITATIONS, in actions between adjacent owners of realty, 475.

in actions between partners, 143.

TELEGRAPH CORPORATIONS, damages against, for failure to deliver messages, when and by whom recoverable, 534.

TRUSTS, parol evidence to establish, 197.

VALUE of land, opinions of witnesses as evidence of, 568.

VENDOR'S LIEN, subrogation to and waiver of, 95.

- VOLUNTARY ASSOCIATIONS**, action by, cannot be in corporate capacity, 162.
actions by members to protect interests of the association, 169.
assets of, interest of members in, 168.
assets of, right to control and manage, 168, 169.
courts, jurisdiction of, over, 162.
courts, when will interpose as against decision of tribunal provided by the association, 164.
decisions of, when conclusive on members, 167, 168.
defined, 160.
difference between and partnership, 161.
dissolution of, power of courts to declare, 161, 170.
equity jurisdiction over, 161, 163.
expulsion of members, authority to order, 166.
expulsion of members, decision of association, when conclusive, 167.
expulsion of members, jurisdiction of courts to interfere in cases of, 166.
expulsion of members, must be after opportunity to be heard, 167.
forfeiture of membership and other rights in, 168.
jurisdiction of courts over falls short of that over corporations, 164.
members, admission of, will not be controlled by the courts, 166.
members cannot resort to courts till they exhaust the remedies provided by the association, 165.
members, expulsion of, equity will interpose when, 163.
members of, actions between, 161.
members of, have rights substantially like those of partners, 161.
members of, liability of, for acts of other members, 161.
members of, liability of, for contracts and debts of the association, 161.
rules of, assent on members to, is essential, 165.
rules of, expulsion of members under, when reviewable, 164.
rules of, forfeiting membership, 168.
rules of, members may agree to be controlled by, 163.
rules of, must be reasonable, 165.
visatorial powers of courts over, 165.
- WAIVER** of objection to disqualified judge, 323.
- WILLS**, foreign, probating in this state, 817.
- WITNESS**, impeachment by showing contradictory statements, 238.
memoranda, testifying from, 316.

INDEX.

ACCESSION.

See **CONFUSION OF GOODS.**

ACCOUNTING.

See **PARTNERSHIP.**

ACCOUNTS.

See **STATUTE OF LIMITATIONS, 1.**

ADVERSE POSSESSION.

- 1. POSSESSION IS NOT ADVERSE, AND STATUTE OF LIMITATIONS DOES NOT APPLY,** where one takes possession of land and holds the same under belief that it was part of his own section, to which it was adjacent, without any intention of claiming any land other than that included in his own section. *Mills v. Penny*, 474.
- 2. TITLE ONCE ACQUIRED BY ADVERSE POSSESSION IS NOT AFFECTED** by a subsequent offer by the adverse possessor to buy the outstanding title. *Frick v. Simon*, 177.
- 3. EVIDENCE OF PAYMENT BY PLAINTIFF OF STREET ASSESSMENTS AND INSURANCE ON PREMISES IS ADMISSIBLE** in an action to quiet title by the adverse possessor against the holder of the outstanding title, to show that the plaintiff's claim was to the whole title. *Id.*

See **Co-TENANCY.**

AGENCY.

- 1. WHEN ACT IS DONE WITHOUT AUTHORITY,** under an assumed agency, it is the duty of the principal, if he would avoid responsibility therefor, to disavow and repudiate it in a reasonable time after information of the transaction. *Central R. & B. Co. v. Cheatham*, 48.
- 2. ONE WILL BE BOUND BY ASSUMED AGENCY, IF HE FAILS TO REPUDIATE IT AFTER HE IS CHARGED WITH NOTICE** that an agent employed by him in the commencement of a transaction is continuing to act in the matter in some way, justifying the inference that he is continuing to act in the same capacity in which he commenced. *Quinn v. Dresbach*, 138.
- 3. WANT OF POSSESSION OF NOTE IS NOT CONCLUSIVE AGAINST AUTHORITY OF ONE TO COLLECT IT,** as the agent of another, although it is a circumstance to be considered. *Id.*
- 4. PRINCIPAL IS NOT AFFECTED BY THE KNOWLEDGE OF HIS AGENT,** obtained in a different transaction, and while acting for another principal, unless

it first be shown that such knowledge was present in the mind of the agent at the very time of the transaction now in question. *Constant v. Rochester University*, 769.

5. **BURDEN IS UPON PARTY SEEKING TO CHARGE A PRINCIPAL WITH KNOWLEDGE OBTAINED BY HIS AGENT IN ANOTHER TRANSACTION**, while acting for a different principal, to prove that such knowledge remained present in the mind of the agent at the time of the transaction in relation to which notice is sought to be imputed to the principal. *Id.*
6. **PRINCIPAL IS BOUND TO KNOW WHAT HIS AGENT DOES** in the course of his employment, and particularly when the profits of the conduct of the agent go into the pockets of the principal while the agent is acting within the scope of his employment. *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 226.
7. **AGENT'S EMPLOYMENT** is to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction. *Id.*
8. **ACT OF AGENT OF CORPORATION**, necessarily acting through agents, is, within the scope of his delegated authority, the act of the corporation, for which the latter must respond to the other servants and strangers alike. *Id.*
9. **WHERE AGENT VIOLATES HIS DUTY TO HIS PRINCIPAL**, and is guilty of wrong to a stranger, whereby the employer is directly and pecuniarily benefited, the wrong is the wrong of the latter, and he stands in the same legal situation as the agent would occupy were he sued for the injury. *Id.*

See **INSURANCE**, 5, 7.

ARBITRATION AND AWARD.

1. **SUBMISSIONS TO ARBITRATION ARE REVOCABLE IN THEIR NATURE**, and the parties cannot make that irrevocable which is of its own nature revocable. *People v. Nash*, 747.
2. **AGREEMENT NOT TO REVOKE A SUBMISSION TO ARBITRATION** will not deprive either of the parties of the power given him by section 2383 of the Code of Civil Procedure of New York to revoke such submission at any time before the closing of the proofs, and the final submission of the cause for decision. *Id.*

ASSIGNMENTS.

See **CONFLICT OF LAWS**; **MORTGAGES**, 4, 5.

ATTACHMENT AND GARNISHMENT.

1. **DEMANDS WHICH MAY BE SUBJECTED TO GARNISHMENT PROCESS** are such only as the defendant in attachment could himself recover of the garnishee in an action of debt or *indebitatus assumpsit*. *Teague v. Le Grand*, 64.
2. **BALANCE DUE ON SUBSCRIPTION TO STOCK** in private corporation, to be paid on call by the board of directors, is not subject to garnishment at law at the suit of a creditor of the corporation when no call has been made. *Id.*
3. **ESTOPPEL BY REPLEVY BOND**. — **WHEN ATTACHED PROPERTY HAS BEEN REPLEVIED**, and the liability of the bondsmen has become fixed by a proper demand and return of forfeiture on the bond,

they are estopped from denying the liability of the property to the process, or from setting up any adversary claim to it. *Roswald v. Hobbie*, 23.

1. **INTERPOSING STATUTORY CLAIM.**—ATTACHED PROPERTY HAVING BEEN DELIVERED TO BONDSMEN on the execution and approval of a replevy bond, they cannot interpose a valid statutory claim to the property while so retaining possession, but must first restore its control to the attaching officer, and may then assert any claim to it which they could have asserted before the execution of their bond. If, however, the bondsmen make the statutory affidavit and execute a claim bond, which the attaching officer accepts and approves, having accepted the replevy bond on the day preceding, it is not error to overrule a motion to strike the claim proceeding from the files, although the officer was not momentarily placed in the actual or constructive possession of the goods. *Id.*
5. **EVIDENCE OF VALUE OF GOODS INVOLVED IN ATTACHMENT SUIT SHOULD BE RECEIVED**, if offered by either party; but its rejection could not harm plaintiffs in attachment who failed to obtain a judgment, and is not error of which they can complain. *Id.*
6. **VALUE OF GOODS ATTACHED AS FIXED IN CLAIM BOND** is the *ex parte* work of the sheriff, and does not conclude either party. But an inventory of the goods, made by the sheriff who levied an attachment on them, is admissible as evidence, in connection with his oral testimony, as tending to show the value of the goods. *Id.*
7. **VARIANCE.**—Plaintiff may not attach for one cause of action, and having sustained his writ, declare for another. *Hambrick v. Wilkins*, 631.
8. **GROUND OF ATTACHMENT**, that the “defendant fraudulently incurred the obligation for which suit is brought,” is sustained by showing a breach of warranty, and that the warranty was fraudulently made. *Id.*
9. **APPLICATION OF PROCEEDS OF SALE OF ATTACHED PROPERTY IN HANDS OF SHERIFF, AFTER DISSOLUTION OF ATTACHMENT.**—Upon the dissolution of an attachment, the money realized from the sale of the attached property, in the hands of the sheriff, is not to be regarded in the custody of the law in such a sense as to preclude the sheriff from applying it upon an execution against the property of the same defendant issued to and received by the same officer after the receipt of such money. Nor is the defendant, in such case, entitled to so much of such money as will satisfy the costs and damages awarded to him upon the dissolution of the attachment, but such costs and damages are to be applied, as a set-off, upon the unpaid balance of the plaintiff’s judgment. *Evans v. Virgin*, 870.

See HOMESTEADS, 6.

BANKS AND BANKING.

MONEY DEPOSITED IN BANK in the ordinary way is money loaned to the bank, with the superadded obligation that it is to be paid when demanded by check. *Adams v. Schiffer*, 202.

See STATUTE OF LIMITATIONS, 3.

BONDS.

PETITION SUFFICIENTLY ALLEGES CAUSE OF ACTION AGAINST SURETIES OF CONSTABLE ON HIS OFFICIAL BOND when the bond requires him to “faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties required of his office by law,” and the petition avers

the official character of the constable, and an arrest made by him in discharge of the functions of his office, and also alleges such arrest to have been made unlawfully and oppressively, and without probable cause, the malicious and unlawful beating of the person arrested, and his unlawful and malicious incarceration in jail over one night, and the willful neglect to procure any care, attention, or medical treatment for such person during his incarceration, and his need thereof. In such case, it cannot be successfully urged as a defense that the alleged wrongful acts of the constable were not done in the line of his duty, or that his acts were illegal and forbidden by law, and were the result of his private malice. *Olancy v. Kenworthy*, 508.

See EXECUTORS AND ADMINISTRATORS; MUNICIPAL CORPORATIONS; SURETYSHIP, 3-6.

BOUNDARIES.

1. NEW SURVEY WILL NOT PREVAIL AS TO LOCATION OF QUARTER-SECTION CORNERS OVER DIRECT TESTIMONY of witnesses who saw corners as located by the original survey. *Mills v. Penny*, 474.
2. BOUNDARY LINE OF RIPARIAN OWNERS' LANDS. — The Mississippi River is not a navigable stream at common law, and the title of a riparian proprietor whose lands are bounded by it extends to the middle thread of the stream, and includes islands which are separated from the mainland by sloughs. *Fuller v. Dauphin*, 385.
3. RIPARIAN PROPRIETOR. — MEANDERED LINE IS NOT A BOUNDARY which does not include the *locus in quo*, is not marked on the maps or draughts, but only appears in the field-notes of the original government survey, and is run for the purpose of ascertaining the quantity of land in a fraction, or inside the meander. *Id.*

See TRESPASS, 1; WATERS, 2, 3.

CHAMPERTY.

LAW OF CHAMPERTY DOES NOT APPLY to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed was made, and this rule applies to an executory verbal contract of sale. *Green v. Wintersmith*, 613.

CHATTEL MORTGAGES.

See MORTGAGES.

CHECKS.

See BANKS AND BANKING; NEGOTIABLE INSTRUMENTS, 3-8.

COMMON CARRIERS.

1. NEGLIGENCE. — DUTY OF RAILROAD COMPANY ENGAGED IN THE TRANSPORTATION OF PASSENGERS, WHETHER BY FREIGHT OR PASSENGER TRAINS, is to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its negligence, and the same liability is incurred for the safety of a passenger in a caboose attached to freight train as for one in a regular passenger-coach, where such passenger has been admitted into the caboose, and has paid his fare for transportation as a passenger. *New York etc. R'y Co. v. Doane*, 451.

2. **IT IS DUTY OF RAILROAD COMPANY AS CARRIERS OF PASSENGERS TO PROVIDE SUITABLE STATIONAL ACCOMMODATIONS** to enable persons to enter its cars and passengers to safely alight therefrom, and if the train is stopped at some place other than the regular station, and passengers are required to alight, and are injured in consequence, the company is liable to the same extent as if the injury was occasioned by the defectiveness of its own premises. *Id.*
3. **PASSENGERS ON FREIGHT TRAIN, IF REQUIRED TO LEAVE CAR AT SOME PLACE OTHER THAN STATION, ARE ENTITLED TO CARE AND ATTENTION** such as to enable them to properly reach the station, especially so where the place at which they are discharged is inappropriate or inconvenient; such passengers may, under certain circumstances, be discharged at some place other than the station platform. *Id.*
4. **DUTY AND LIABILITY OF RAILROAD COMPANY TO PASSENGERS.**—Train should be stopped at station, but if it stops short of the station or goes beyond, it should be either backed to the station, or the passenger should be notified where and how to alight, and be warned of any attendant danger, and should be given such assistance or instructions as are necessary to assure a safe return to the station-house; and where an injury results to the passenger so required to alight at an unusual place, the company is liable in the absence of fault on the part of the passenger. *Id.*
5. **IT IS NOT CONTRIBUTORY NEGLIGENCE FOR PASSENGER TO EXPOSE HIMSELF,** at the invitation of a carrier, to risk of danger created by the carrier, which the passenger did not know, and of which no warning was given to him. Thus in this case, the plaintiff was invited by the defendant to take passage on one of its cars at a time when the only place left for him to take was on the foot-board running along the outside of the car, which was an open one. At the place where he got on the car the track was single, and he did not know that it was different elsewhere. On another part of the line there was a double track, and the space between the tracks was not sufficient to allow two cars going in different directions, each carrying passengers on the foot-boards, to pass with safety to such passengers. At this part of the line the plaintiff was knocked off his car, and injured by colliding with a passenger standing on the foot-board of a similar car of the company passing in an opposite direction on the other track. It was held that, if the question of contributory negligence was raised by the case, it was one for the jury, and there was no error in refusing to nonsuit and submitting that question to them. *City R. R. Co. v. Lee*, 798.
6. **RAILROADS.**—**OFFICERS OF RAILROAD TRAIN, AS TO PASSENGERS IN TRANSITU, ARE TO BE CONSIDERED** as the corporation itself, and it is therefore as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it. *Louisville & N. R. R. Co. v. Ballard*, 600.
7. **RAILROAD COMPANY IS LIABLE FOR EXEMPLARY DAMAGES IN CASE OF INJURY TO PASSENGER** resulting from a violation of duty by one of its employees in the conduct of the train, if such violation of duty be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences. As to female passengers, their contract of passage embraces an implied stipulation that the company will protect them against general obscenity, immodest

conduct, or wanton approach. But "indecorous" conduct alone, even toward a female passenger, is insufficient to authorize exemplary damages. *Id.*

8. **DUTY OF RAILWAY CONDUCTOR TO INFANT PASSENGER.** — Where an ordinary country boy, about eleven years old, is sent on a freight train to a city seven miles from home by his mother, who previously warns him not to attempt to get off the train while it is moving, and on his arrival at the station, fearing that the train will carry him off, and that he will not be able to get back, and seeing an adult fellow-passenger, who tells him that he guesses the train will not stop at the station, get off while the train is slowly moving past the station, attempts to get off while the train is thus moving, and falls and is injured, the jury are justified in finding that the conductor was negligent in not telling him when he collected his fare and asked his name and destination that the train would first run by the station, and afterwards back down to the platform to allow the passengers to alight, or in not being himself present, or having some one else present, to prevent the boy from leaving the train at the station. *Hemingway v. Chicago etc. Co.*, 823.
9. **INFANT OF TENDER AGE, WHEN NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.** — Where an infant of tender age, under great fear and excitement, and apprehensive of being carried away and beyond his destination, attempts to get off at a railway station while the train is slowly moving past it, and in doing so falls under the train and is injured, he is not guilty of contributory negligence. *Id.*
10. **PARENT NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, WHEN.** — Where danger to an infant railway passenger arises from an unaccustomed irregularity in the movement of the train, his parents are not guilty of negligence in not warning him as to such danger, the irregularity being unknown to them when they send him on the journey, especially where they do warn him against ordinary dangers, to the extent of their knowledge of them. *Id.*
11. **RES GESTÆ** — Evidence of what a fellow-passenger said to the plaintiff as to whether or not a railway train upon which they were riding was going to stop at a station, in immediate connection with the plaintiff's act in attempting to get off the train, is admissible as part of the *res gestæ*, not to charge the defendant with liability, but as explanatory of the plaintiff's motives and mental condition at the time. *Id.*
12. **FACT THAT TRAIN DID NOT STOP AT STATION** may be alluded to in charging the jury, for the purpose of showing that in view of it it might be the duty of the company to instruct the plaintiff that the train would not stop at the station in the first instance, but would return to it, so as to put him on his guard against an attempt to leave the train while in motion, although the company was not bound to stop the train at the station. *Id.*
13. **RAILWAY COMPANY MUST ANNOUNCE THE NAME OF THE STATION** on the arrival of the train thereat, and give passengers an opportunity to alight in safety. Failing to do this, the company is answerable in damages to any person injured thereby. *Dorrah v. Ill. Cent. R. R. Co.*, 629.
14. **EXEMPLARY DAMAGES WILL NOT BE ALLOWED FOR FAILURE TO STOP A TRAIN AT A STATION**, and give a passenger opportunity to alight therefrom, unless the failure to stop was willful, or the wrong was aggravated in some manner by the railroad company or its employees. *Id.*

15. **SHIPPER IS BOUND BY CONTRACT LIMITING CARRIER'S LIABILITY, THOUGH HE DID NOT READ IT** nor hear it read before signing it, provided the carrier resorted to no unfair means, and practiced no fraud or imposition in procuring the signature, and the shipper had the opportunity to know its contents. *St. Louis I. M. Co. v. Weekly*, 397.
16. **CONNECTING LINES OF CARRIERS, RIGHTS AND LIABILITIES OF.** — A connecting carrier, by receiving freight from another carrier, under a contract between the consignor and the latter, becomes the agent of such other carrier to complete his contract to the extent of shipping it over so much of his route as forms a part of the route over which the shipment was to be made, and is liable for any loss resulting from his failure to perform the contract, but he is also entitled to the benefit of all valid limitations of the carrier's liability contained in the contract. *Id.*
17. **VALIDITY OF CONTRACT LIMITING CARRIER'S LIABILITY TO SPECIFIED SUM.** — A limitation in a contract fairly entered into between a railroad company and a shipper of live-stock over its road, restricting the company's liability in any case to the sum of fifty dollars for each animal lost, is, if based upon a reduction in the charge made for the transportation of the stock, reasonable, and will be enforced as the measure of the company's liability, although the animal lost is shown to have been worth from six hundred to eight hundred dollars. *Id.*
18. **BURDEN OF PROOF OF NEGLIGENCE WHERE CARRIER'S LIABILITY IS LIMITED BY CONTRACT.** — Where live-stock is shipped under a contract limiting the carrier's liability, pursuant to which the shipper takes charge of the stock during the transportation, riding for that purpose on the train with the stock, free of additional charge, the burden of proof is upon the shipper, in an action to recover for the loss of the stock, to show that the loss resulted from the default or negligence of the carrier. *Id.*
19. **RAILROAD COMPANY ACCEPTING PERISHABLE FREIGHT TO BE CARRIED OVER ITS OWN AND CONNECTING ROADS** is bound to forward it as promptly as it can, until it has delivered or offered to deliver it to the connecting carrier, and it cannot shield itself from liability for failure to perform its duty by merely showing that its agent supposed that there would be a delay in forwarding it by the connecting carrier. The company is bound to know when it contracts to carry such freight in that manner whether it can be carried through without such delay as will destroy or injure freight of that character. *Blodgett v. Abbot*, 873.
20. **STATEMENT AS TO TIME REQUIRED FOR PERISHABLE FREIGHT TO REACH ITS DESTINATION**, made by a railroad agent to a shipper, is admissible in evidence in an action to recover damages for delay in transporting it, when such statement may have been the inducement of the contract. A statement that such freight would reach its destination at a certain time would have the force of a contract, and if the time was a reasonable one, the contract would be within the scope of such agent's authority. *Id.*
21. **MATERIAL QUESTION OF FACT SHOULD BE SUBMITTED TO JURY.** In an action to recover damages for delay on the part of a railroad company in the transportation of perishable freight, where the evidence as to whether it was the duty of the conductor of the train, to which the car the freight was being carried in was attached, to place the car on a "Y" at the crossing of a connecting road by which the freight was to be forwarded to its destination is conflicting, the question, which is a material one, should be submitted to the jury. *Id.*

CONFLICT OF LAWS.

1. **INSURANCE.**—A corporation, in addition to its corporate home in the state of its creation, has a legal location, place of business, and corporate home in any jurisdiction in which it has property exposed to execution sufficient to satisfy any judgment which may be rendered against it, and in which, either by force of statutory law there binding upon it, or by its own act or agreement, or by the combined force of both, it so far becomes, in the person of its agent duly authorized for that purpose, a resident therein, as that a general personal judgment can be obtained, which will be binding upon it and any property which it may have in any jurisdiction, as completely as if it had been sued and personally served in the state of its creation where it has its principal legal location and place of business. *Crouse v. Phoenix I. Co.*, 298.
2. **FOREIGN ASSIGNMENT.**—An insurance company incorporated under the laws of Connecticut, but doing business in New York, after having complied with the law of that state, sustained a loss on a policy issued to a resident of that state on property therein, after which the assured made an assignment in trust giving a preference to creditors and valid by the laws of that state, the policy being among the assets assigned, subsequent to which certain judgment creditors of the assured, residents of that state, with knowledge of the assignment, garnished the company in Connecticut, as the debtor of the assured, pending which suit the trustee began an action in New York to recover the loss on the policy, and obtained judgment, which was paid by the company. After this such judgment creditors obtained judgment in their suit in Connecticut, and sought by *scire facias* to compel the company to again pay the loss to them. The court held the assignment valid in New York, the domicile of the assured and the *situs* of the property, though it was not valid in Connecticut; that it passed the title to the policy, and the right to sue thereon to the trustee; that the company was protected by the New York judgment, and was not compelled to pay the loss again in Connecticut. *Id.*

CONFUSION OF GOODS.

1. **BURDEN OF PROOF ON WRONG-DOER.**—Where, in a case of confusion of goods, the nature of the wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the burden of proof is on defendant. The law aids the remedy against the wrong-doer, and supplies the deficiency of proof caused by his misconduct by making every reasonable intendment against him, and in favor of the injured party. The relative situation of the parties, disclosed by the character and nature of the transaction, makes this rule. *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 226.
2. **MAN WHO WILLFULLY PLACES THE PROPERTY OF ANOTHER** in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will be compelled to bear the inconvenience of uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share cannot be distinguished, or of responding in damages for the highest value at which the property can be reasonably estimated. *Id.*
3. **WRONG-DOER**, by so committing his wrongs upon property held by two or more parties successively in point of time so that neither can show

with certainty what he has suffered, is not permitted to defeat a recovery by either, and be thus exempted from liability. *Id.*

CONSTITUTIONAL LAW.

1. **STATUTE ATTEMPTING TO TAKE FROM THE BROADWAY SURFACE COMPANY, ITS STOCKHOLDERS and creditors, its franchise and property, and bestow them upon the municipality of New York, or to direct a sale of such franchise, and the payment of the purchase price to such city, is unconstitutional, and therefore void.** *People v. O'Brien*, 684.
2. **WHEN, BY REASON OF THE DISSOLUTION OF A CORPORATION, ITS PROPERTY HAS VESTED IN ITS DIRECTORS, in trust for its stockholders and creditors, the legislature has no power to subsequently provide for the appointment of a receiver and the transfer of the corporate assets to him; such appointment to be made by a court in an action to which such directors are not parties, and in which the court has no other judicial discretion or authority than to designate such receiver.** *Id.*
3. **STATUTE FORBIDDING A STREET-RAILWAY COMPANY from leasing its rights or franchises to any person or company operating a road parallel thereto does not inhibit traffic contracts with parallel roads for the partial use of their respective routes beyond the line of parallelism.** *Id.*

CONTEMPTS.

SUPREME COURT WILL TREAT AS CONTEMPT USE OF LANGUAGE IN BRIEF FILED THEREIN which impugns the motives of, and is disrespectful to, the lower court. *Sears v. Starbird*, 123.

CONTRACTS.

1. **ONE FOR WHOSE BENEFIT CONTRACT IS MADE WITH ANOTHER MAY MAINTAIN ACTION THEREON in his own name against the promisor.** *West v. Western Union Tel. Co.*, 530.
2. **PARTIES TO A CONTRACT ARE PRESUMED TO INTEND TO BIND THEIR PERSONAL REPRESENTATIVES as well as themselves.** *Kernochan v. Murray*, 744.
3. **NOVATION.** — Where contractors, with the consent of all the parties, retain out of the wages of laborers employed by them an amount of money due from the laborers to boarding-house keepers, to be paid by the contractors to the boarding-house keepers, the laborers discharging their claims for labor, and the boarding-house keepers discharging the laborers, this is a case of novation, and the boarding-house keepers may recover from the contractors in an action of *assumpsit* for money had and received to and for their use. *Sterling v. Ryan*, 818.
4. **MISREPRESENTATION TO AVOID CONTRACT must be the proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place.** *Adams v. Schiffer*, 202.
5. **FRAUD MUST RELATE TO FACTS THEN EXISTING, or which had previously existed; hence non-performance of a promise made in the course of negotiations is not of itself fraud or evidence of fraud, and the fact that a party has been defrauded by subsequent transactions cannot operate to affect or invalidate a prior independent contract made, entered into, and executed for a good and valuable consideration.** *Id.*

6. **DURESS OF GOODS.** — WHERE PARTY HAS POSSESSION or control of the property of another, and refuses to surrender it to the control and use of the owner except upon compliance with an unlawful demand, a contract made or money paid by the owner under such circumstances, to emancipate the property, is to be regarded as made under compulsion and duress. *Id.*
7. **DURESS.** — REFUSAL ON DEMAND to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress, if the debtor has done nothing unlawful to cause the financial embarrassment which compelled him to submit to the extortion. *Id.*
8. **DURESS OF PROPERTY.** — UNDER AN AGREEMENT to convey a perfect title to certain property, the grantor gave a quitclaim deed, which the grantee accepted; an unfounded claim to the same property was then made by a third party, and voluntarily bought up by such grantee. At this time the grantor was a depositor in the grantee's bank, and the latter, by refusing to honor his checks, compelled him, in a settlement between them, to pay part of the money paid to such third party by the grantee, thus causing what constitutes a duress of the grantor's property, and making the settlement void, because the acceptance of the quitclaim deed by the grantee was a waiver of a covenant against encumbrances, and all right to repayment of any part of the sum paid such third party. *Id.*
9. **RESCISSION — RESTORING CONSIDERATION AND PLACING PARTIES IN STATU QUO.** — In an equitable action for rescission of a contract on the ground of fraud, it is not indispensable that the complainant be able to place the defendant *in statu quo* in those cases where it would not be inequitable to permit a rescission without so doing. Hence where a member of an insolvent firm by false and fraudulent representations induced a stranger to purchase an interest in such firm and to become a partner therein, and the firm was subsequently declared insolvent and its assets put into the hands of a receiver, it was adjudged that a court of equity would decree a rescission of the sale, though it was impossible to place the parties *in statu quo*. *Brown v. Norman*, 663.
10. **RATIFICATION OF CONTRACT INDUCED BY FRAUDULENT REPRESENTATIONS** WILL NOT BE INFERRED from delay in seeking its rescission, when the injured party had no knowledge of the fraud practiced on him; and when his delay was the result of his misplaced confidence in the false statements made to him. *Id.*

CORPORATIONS.

1. **THE PEOPLE OF THE STATE HAVE NO AUTHORITY, UPON THE DISSOLUTION OF A CORPORATION** and the appointment of a receiver, to maintain a supplementary action against the receiver, the corporation, and others, for the purpose of obtaining a declaration of the rights and liabilities of the several parties, determining what were the assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors, and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation. Per Ruger, C. J. *People v. O'Brien*, 684.
2. **CONSTITUTIONAL LAW.** — THE POWER TO REPEAL ACTS OF INCORPORATION, though reserved in such acts, must be exercised in subjection to the provisions of the federal constitution. *Id.*

3. CORPORATION MAY ACQUIRE THE FEE IN PROPERTY, though created for a limited period only. *Id.*
 4. REPEAL OF A LAW AUTHORIZING CORPORATIONS does not destroy organization formed under it. *Id.*
 5. DISSOLUTION OF A CORPORATION DOES NOT TAKE AWAY OR DESTROY ITS PROPERTY OR ANNUL ITS CONTRACTS. Such dissolution has no other operation upon its contracts or property rights than the death of a natural person has on his. *Id.*
 6. RESERVATION OF RIGHT TO REPEAL THE CHARTER OF A CORPORATION enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business; but personal and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not in their general nature depend upon the powers conferred by the charter, are not destroyed by such repeal. *Id.*
 7. FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY SURVIVES THE DISSOLUTION of the corporation grantee, resulting from the repeal of its charter enacted pursuant to a right of repeal reserved by the legislature. *Id.*
 8. UPON THE REPEAL OF AN ACT OF INCORPORATION, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees. *Id.*
 9. AN ACTION AT LAW BY A SINGLE CREDITOR WILL LIE AGAINST ANY STOCKHOLDER of an insolvent corporation to enforce an individual liability created by its charter. *Shalucky v. Field*, 617.
 10. STOCKHOLDERS ARE PARTNERS, AND LIABLE AS SUCH TO THE CREDITORS OF THE CORPORATION to an amount equal to the amount of stock held by them, respectively, under a provision of incorporation that "when default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively." *Id.*
 11. AGREEMENT AS TO PAYMENT OF STOCK BY CREDITING WITH DIVIDENDS, EVEN IF VALID, IS RESCINDED BY THE SUBSEQUENT GIVING OF A STOCK NOTE therefor, and the collection of such note cannot be defeated by the agreement. *McDowell v. Chicago S. Works*, 381.
- See ATTACHMENT AND GARNISHMENT, 2; CONSTITUTIONAL LAW; FRANCHISES; STATUTES, 3; UNINCORPORATED SOCIETIES; WATERS, 4.

COSTS.

See WILLS, 6.

CO-TENANCY.

1. ONE IN ADVERSE POSSESSION OF LAND DOES NOT BECOME CO-TENANT with the remaining tenants in common by taking a deed of the entire tract from one of the co-tenants, by whom the outstanding title was held, and continuing in possession under it. *Frick v. Sinon*, 177.
2. ADVERSE POSSESSION. — ALTHOUGH, AS GENERAL RULE, ENTRY OF ONE TENANT IN COMMON WILL INURE to the benefit of all, yet he may

so enter and hold as to render his entry and possession adverse, and an ouster of co-tenants; and where the vendee of one tenant in common sets up claim in his own right to the whole tract of land, and enters and holds possession openly and continuously for more than the statutory period, his possession is adverse, and a recovery by the other tenants in common is barred, although they had no actual notice of the adverse character of the possession. *Greenhill v. Briggs*, 579.

3. **OSTER. — EXCLUSIVE POSSESSION BY A TENANT IN COMMON WHO HAS TAKEN A CONVEYANCE**, purporting to convey the property in severalty, does not constitute an ouster of his co-tenants, and therefore cannot bar their right to partition, although he claims to own the whole of the tract, unless knowledge of such claim is brought home to them. *Hignite v. Hignite*, 673.

COURTS.

JUDGE OF SUPERIOR COURT OF ONE COUNTY, WHO HOLDS COURT IN ANOTHER, MUST BE PRESUMED TO HAVE LAWFULLY DONE SO, in the absence of evidence to the contrary, upon the request of the governor of the state, or of a judge of the court in the latter county, as provided for by section 71 of the Code of Civil Procedure of California. *Newman's Estate*, 146.

CRIMINAL LAW.

1. **IT IS NOT ERROR TO REFUSE CHARGE REQUESTED BY DEFENDANT IN CRIMINAL CASE, CLAIMING an acquittal on a hypothetical statement of certain facts, and ignoring other material facts which there was evidence tending to prove.** *Frazier v. State*, 21.
2. **PROOF OF MOTIVE. — MOTIVE IS INFERENTIAL FACT**, and may be inferred from the attendant and surrounding circumstances, in conjunction with all previous occurrences having reference to and connected with the commission of the offense. *Walker v. State*, 17.
3. **VOLUNTARY DRUNKENNESS IS NO EXCUSE FOR CRIME**, and unless the defendant, indicted for an assault with intent to murder, was, at the time of the shooting, so drunk as to be incapable of forming an intent to take life, his being drunk can avail him nothing. *Id.*
4. **EX POST FACTO LAW** is one which in its operation makes that criminal or penal which was not so at the time the act was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. *Lindzey v. State*, 674.
5. **EX POST FACTO LAW MAY MITIGATE THE PUNISHMENT** of a crime after it is committed. This mitigation must consist of the remission of some separable part of the punishment before prescribed. If one penalty is substituted for another, the courts will not undertake to determine whether the latter is less severe than the former, but will refuse to apply any penalty whatever. *Id.*
6. **CHANGE IN A PENAL STATUTE HAVING BEEN MADE AFTER THE COMMISSION OF AN OFFENSE**, and before a trial and conviction therefor, whereby the crime was so defined as to make criminal something which was before lawful, and a greater punishment prescribed, it was held that the offender could not be punished under either statute. *Id.*
7. **TO CONSTITUTE OFFENSE OF LARCENY**, there must be a wrongful taking possession of the goods of another, with the intent to deprive the owner of his property, either permanently or temporarily. The

- accused must have acquired dominion, so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent. But the caption may be constructive, as when possession is obtained by trick, fraud, or deception. *Frazier v. State*, 21.
8. DEFENDANT MAY BE CONVICTED OF LARCENY OF WHICH HE IS CHARGED, where, having shot and killed a hog with felonious intent, he covered it with pine-tops in order to conceal it until he could return and secretly remove it, and subsequently did remove it, in pursuance of the previous felonious intent, though the removal was with the consent of the owner, such consent being procured by intentional misrepresentation and deception. *Id.*
 9. ENTICING AWAY UNMARRIED FEMALE FOR PURPOSES OF PROSTITUTION. — Under Illinois statute, section 1 of Criminal Code, which provides that the enticing away for the purposes of prostitution or concubinage of an unmarried female of chaste life, and that the aiding or assisting in such abduction shall be a crime, etc., the *gravamen* of the offense is the purpose or intent with which the enticing or abduction is done. Illicit intercourse is not a necessary ingredient of the crime. The offense is complete the moment the subject is removed beyond the control of those legally in charge of her. *Henderson v. People*, 391.
 10. INSTRUCTIONS TO JURY IN PROSECUTION UNDER STATUTE FOR ENTICING AWAY UNMARRIED FEMALE of chaste life for purposes of "prostitution" or "concubinage" need not explain to jury the meaning of these terms under the statute, in the absence of any request so to do. There is at least no sufficient error therein to warrant a reversal on such grounds alone. *Id.*
 11. "CONCUBINAGE" UNDER STATUTE AGAINST ENTICING AWAY UNMARRIED FEMALE. — No great length of time or long-continued illicit intercourse is necessary to the establishment of that relation which results in concubinage. *Id.*
 12. ENTICING AWAY UNMARRIED FEMALE FOR THE PURPOSE OF PROSTITUTION. — The offense is complete under the Illinois statute, section 1, Criminal Code, making such act a crime, where the accused, under the professed purpose of marrying such female, entices her away from her parent's control and obtains illicit intercourse with her, but has no real intention of marrying. *Id.*
 13. ON TRIAL FOR ASSAULT WITH INTENT TO MURDER, IT HAVING BEEN SHOWN that the defendant and the woman injured had lived in adultery for some time, and that she left him, and the evidence tended to show that he shot her because of her persistent refusal to return and live with him, it is competent for the prosecution to prove the relation which had existed between them, the defendant's continuous efforts to induce her to return, her repeated refusals, his following her from place to place, his threats on each refusal, and his demonstrations of violence on such occasions, as bearing on the question of intent with which the assault was made. *Walker v. State*, 17.
 14. SUBSEQUENT THREATS. — ON TRIAL FOR ASSAULT WITH INTENT TO MURDER, EVIDENCE THAT DEFENDANT, after the indictment had been found, and a few weeks before the trial, as he passed the injured woman in the court-house, said to her, "I'll get you yet," is admissible as manifesting his state of feeling towards her, not only at the time of the menace, but

also at the time of the assault, and that he still cherished the malicious intent. *Id.*

15. REMARKS OF JUDGE ON EVIDENCE, WHEN NOT REVERSIBLE ERROR. — On the trial of a prosecution for an assault with intent to murder, the court having omitted, in the general charge, to instruct the jury specifically as to the offense of assault and battery, the defendant's counsel called attention to the omission, and the presiding judge replied: "I know of no evidence in the case which would warrant a verdict for assault and battery." Such remark, in the hearing of the jury, is not reversible error, where the record discloses no evidence on which a verdict for an assault and battery only could have been reasonably found. *Id.*
16. DEPOSITION OF WITNESS CONVICTED OF MURDER AFTER IT WAS TAKEN becomes incompetent by his conviction, and cannot be admitted after his execution, although it was read on a former trial had before his conviction. *St. Louis I. M. R'y v. Harper*, 86.
17. EVIDENCE. — UPON TRIAL FOR MURDER OR MANSLAUGHTER, THREATS MADE BY THE DECEASED against the accused, although not communicated to him, are competent as evidence upon the question whether the one or the other was the aggressor, and whether the act of the accused was done in defending himself. *Hart v. Commonwealth*, 576.
18. MURDER — BURDEN OF PROOF OF INSANITY. — It is proper to charge the jury that "when the state shows, beyond a reasonable doubt, in the first instance, that the defendant is guilty, then defendant comes to his plea of insanity; and when he comes to rely upon such plea, then, under the law, he is required, in order to excuse his act on account of the alleged insanity, to show, by a preponderance of the evidence, — that is, by the greater weight of credible evidence in the case, — that he was insane"; and an instruction may properly be refused which is, in effect, that if the jury believed it probable from the evidence that accused was insane, this would overcome the presumption of insanity, and entitle him to an acquittal. *State v. Trout*, 499.
19. SUFFICIENCY OF VERDICT — MURDER. — Where court instructed the jury as to the necessary elements of murder in the first degree, and that it was punishable with death, or with imprisonment for life, at hard labor, in the state penitentiary, and the verdict of guilty was returned, but in designating the punishment as imprisonment in the penitentiary for life the words "at hard labor" were omitted from the verdict, such verdict sufficiently indicates which of two punishments was adjudged. *Id.*
20. HOMICIDE — DEATH FROM EXPOSURE COMPELLED BY DEFENDANT — INSTRUCTIONS TO JURY. — On trial of indictment of husband for murder of wife, it appeared that they quarreled in the night-time, that the husband threatened to cut his wife's throat, and that thereupon she fled from the house and died from exposure. An instruction which authorized the jury to convict, "if they believed the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm at his hands," was properly given; but in this case, the accused being a cripple in one arm, and it appearing that the deceased, his wife, had the disposition and ability to fight with him, it was error not to permit the jury to inquire "whether or not such fear was well grounded or reasonable"; and the jury should have been further instructed "that, to convict, they must believe the death of the wife by exposure was the natural and probable consequence of leaving

the house at the time and under the circumstances." *Hendrickson v. Commonwealth*, 596.

21. **HOMICIDE.**—EVIDENCE THAT DECEASED HABITUALLY WENT ARMED WITH DEADLY WEAPONS, and that this was known to his slayer, is admissible in behalf of the latter, on the same principle which justifies the admission of evidence of the threats or character of the deceased. *King v. State*, 681.
22. **HOMICIDE.** — CHARACTER OF DECEASED cannot be shown by particular acts of misconduct not connected with the accused, as that he had engaged in frequent fights in which he used deadly weapons, and therewith made deadly assaults on his antagonists, and that these facts were known to the accused. *Id.*
23. **DECLARATIONS** — RES GESTÆ. — STATEMENT MADE BY A SLAYER ABOUT A MINUTE AFTER shooting the deceased, of his reason for so doing, is not admissible in his favor. *Id.*
24. **TO WARRANT A CONVICTION FOR INCITING OR PROCURING A PERSON TO COMMIT PERJURY**, under section 228 of the Illinois Criminal Code, it must appear that the accused urged such person to give false testimony, knowing that he as well as himself was aware of its falsity, since the person so urged could not be guilty of perjury unless he himself knew such proposed testimony would be false; if he believed it to be true, the crime contemplated by the provisions of section 228 does not exist. *Coyne v. People*, 324.
25. **TO CONSTITUTE THE CRIME OF PERJURY**, there must be a willful, corrupt, and false swearing or affirming; the testimony must be material to the issue or point in question; the witness must know the statements so made by him to be false, and they must be given with the intent to mislead the court or jury. *Id.*
26. **PUNISHMENT IMPOSED BY CITY GOVERNMENT UPON OFFENDER FOR HAVING VIOLATED** the police regulations of the city is no bar to a prosecution by the state for the same acts, when they also constitute an offense against the laws of the state. And the provision in the city charter which gives the city court exclusive jurisdiction of all offenses committed against the ordinances and by-laws of the city means that the jurisdiction of such court is exclusive, so far as the act constitutes an offense against the city. *Kemper v. Commonwealth*, 593.
27. **CONFESSION.** — THE COURT SHOULD, BEFORE ADMITTING A CONFESSION IN EVIDENCE, conduct a preliminary investigation, out of the presence and hearing of the jury, if requested by the defendant, to determine whether it is competent or not. *Ellis v. State*, 634.
28. **OF THE COMPETENCY AS EVIDENCE OF AN ALLEGED CONFESSION, THE COURT** is the sole judge. The jury cannot reject it because they deem it incompetent. *Id.*
29. **AFTER A CONFESSION HAS BEEN ADMITTED BY THE COURT**, either party has the right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide whether the confession was competent, and all other facts and circumstances relevant to the confession, or affecting its weight as evidence; and if it should be made to appear at this point, or any other during the trial, that the confession was made under such circumstances as to render it incompetent, it should be excluded from evidence by the court. *Id.*
30. **CONFESSION.** — JURY ARE NOT BOUND TO BELIEVE OR GIVE WEIGHT TO A CONFESSION because the court has decided it to be competent evidence

before them. They may believe or disbelieve it, the same as other testimony properly submitted for their consideration. *Id.*

31. FORMER DECISION OF THIS COURT, THAT WHETHER A CONFESSION WAS VOLUNTARY OR NOT might be determined by the jury, in cases where there was a conflict of evidence on the subject, is overruled. *Id.*

DAMAGES.

1. DAMAGES FOR MENTAL SUFFERING FOR INJURIES CAUSED PLAINTIFF BY NEGLIGENCE OF DEFENDANT MAY BE RECOVERED, where mental suffering is an element of physical pain, or is the natural and proximate result of the physical injury. *West v. W. U. Tel. Co.*, 530.
2. MENTAL SUFFERING IS NOT AN ELEMENT OF DAMAGES UNLESS BASED ON BODILY INJURY, or unless the injury from which it results was attended by circumstances of malice, insult, or oppression. *Dorrah v. Ill. Cent. R. R. Co.*, 629.

See COMMON CARRIERS; EXECUTIONS, 9; NEGLIGENCE; NUISANCE; TELEGRAPHS.

DEEDS.

1. LEGISLATURE HAS POWER TO VALIDATE DEEDS IMPERFECT FROM MERE INFORMALITIES. *Lindley v. O'Reilly*, 802.
2. DESCRIPTION. — Description of land as part of "southeast quarter of section 5, township 14, range 4 east," is void for uncertainty, because there is nothing to show which "part" is intended. *Tierney v. Brown*, 679.
3. DESCRIPTION of land as "south part of section 5, township 14, range 4 east, 225 acres," is not void for uncertainty. The lands will be located by laying off 225 acres, having the south, east, and west sides of the section for boundaries, and the remaining boundary is parallel to the south line of the section, and sufficiently distant therefrom to include the requisite quantity. *Id.*
4. DESCRIPTION. — TAX DEED NEED NOT STATE THE COUNTY OR STATE in which lands are situate, when it describes them by section, subdivision of section, township, and range. It will be presumed that the tax collector did not violate his official duty by selling lands beyond the county in which he was authorized to act. *Lewis v. Seibles*, 649.
5. POSSESSION OF DEED BY GRANTEE NAMED THEREIN, OR BY ONE CLAIMING UNDER HIM, is *prima facie* evidence of its delivery. *Ward v. Dougherty*, 151.
6. DEED DULY EXECUTED IS PRESUMED TO HAVE BEEN DELIVERED AT ITS DATE, under section 1055 of the Civil Code of California. *Id.*
7. IDENTITY OF GRANTOR WITH DEFENDANT IS PRESUMED FROM IDENTITY OF NAME under section 1963 of the Civil Code of California, in an action to quiet title by a person claiming under a deed from a grantor having the same name as the defendant. *Id.*
8. DESCRIPTION IN TAX DEED of "one lot, and the dwellings thereon, southwest corner of Franklin and Pine streets," accompanied by a statement that the property was assessed to Thomas J. Dowling, must be regarded as sufficient, if it appears from other evidence that the only property assessed to him was in the city of Natchez, on the two streets named, and an accurate description of the property so assessed is proved. *Reber v. Dowling*, 651.

See CHAMPERTY; ESTOPPEL, 2; EXECUTIONS, 11-14; FRAUDULENT CONVEYANCES; MORTGAGES, 11, 12; PUBLIC LANDS; TRUSTS AND TRUSTEES.

DETINUE.

See JUDGMENTS, 1.

DIVORCE.

See JUDGMENTS; PROCESS, 1

DURESS.

See CONTRACTS.

EJECTMENT.

1. ONE WHO ENTERS ON LAND PENDING AN ACTION OF EJECTMENT to recover the possession thereof is presumed to hold under the defendant therein, and if he holds by an independent title, it is incumbent upon him to show that fact. *Ritchie v. Johnson*, 118.
2. PLAINTIFF IN EJECTMENT WHO HAS RECOVERED JUDGMENT IS ENTITLED TO WRIT of possession against a person who entered under the defendant after the commencement of the action, and such person cannot resist his application for the writ on the ground that he holds under an independent title acquired after his entry. *Id.*
3. TO RECOVER IN EJECTMENT, LEGAL TITLE MUST BE SHOWN in plaintiff; mere equitable title is not sufficient. Where the plaintiff seeks to recover lands, the title whereof he claims in fee-simple, he is bound to show in himself a legal, as contradistinguished from an equitable, title. *Barrett v. Hinckley*, 331.
4. EJECTMENT. — THE ESTATE AND INTEREST OF THE MORTGAGEE MAY BE CONVEYED BY DEED, ALTHOUGH IN FORM OF AN ASSIGNMENT, to the holder of the indebtedness, or even to a third party; such an assignee, if owner of the mortgage indebtedness, might no doubt maintain ejectment in his own name for his own use; or the action might be brought in his own name for the use of a third party owning the indebtedness. *Id.*
5. EVIDENCE. — OUTSTANDING TITLE OF MORTGAGEE CANNOT BE SHOWN TO DEFEAT ACTION IN EJECTMENT brought by mortgagor. *Id.*
6. EJECTMENT — RELATIVE LEGAL AND EQUITABLE RIGHTS OF ASSIGNEE OF NOTE AND MORTGAGE. — Mortgage is not assignable at law by mere indorsement, as in case of commercial paper, so as to pass the legal title in the instrument or clothe the assignee with this immunity of an innocent holder, except under certain circumstances; but where one by virtue of an assignment becomes the equitable owner of the note and mortgage, he may thereby obtain such an interest or equity in the land as to entitle him to have it sold in satisfaction of the debt. *Id.*
7. THE MORTGAGEE MAY MAINTAIN EJECTMENT AS WELL BEFORE AS AFTER DEFAULT, unless there is an express provision that the mortgagor should retain possession till default in payment, since by the execution of the mortgage the entire legal estate passes to the mortgagee. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union, including Illinois, in which the common-law system prevails. *Id.*
8. OWNER OF LEGAL TITLE MAY NOT MAINTAIN EJECTMENT UNDER ALL CIRCUMSTANCES. — This is particularly so in respect to a mortgage title; therefore ejectment would not lie against a third party who is assignee from the mortgagee for a valuable consideration of the mortgage indebtedness. *Id.*

9. **EJECTMENT CANNOT BE MAINTAINED BY ONE HAVING A MERE NAKED TITLE TO LAND** in which he has no beneficial interest, and in respect to which he has no duty to perform, against the equitable owner or any one having an equitable interest therein with a present right of possession. *Id.*
10. **EJECTMENT.**—THE DISTINCTION BETWEEN THE RIGHTS OF THE MORTGAGEE AT LAW AND IN EQUITY considered at length under both the English and American view. *Id.*

EMINENT DOMAIN.

1. **EMINENT DOMAIN.** — WHEN PRIVATE PROPERTY HAS BEEN ONCE TAKEN FOR SPECIFIC PUBLIC USE, and compensation made, it should not be used for a foreign purpose without a new legal taking or the consent of the party from whom it was derived, but it may be applied to any new mode of user tending to the primary or general purpose. A railroad may, therefore, under legislative sanction, have a joint occupancy of a highway with other modes of travel having the same end in view, but it cannot occupy or use it to the unreasonable exclusion or obstruction of such other modes. *Fulton v. Short Route Co.*, 619.
2. **JURY MAY BE INTERROGATED AS TO ANY PARTICULAR ELEMENT OF DAMAGE SUFFERED**, about which testimony is offered, in proceedings under the Kansas statute to condemn a right of way over lands for a railroad; but a refusal to submit a question asking the jury to state all the elements or sources of damage, and the amount allowed for each, is not erroneous. *Leroy & W. R'y Co. v. Hawk*, 566.
3. **OPINIONS OF FARMERS AS TO MARKET VALUE OF FARMING LAND ARE ADMISSIBLE IN CONDEMNATION PROCEEDINGS**, where they live in the vicinity of the land, are acquainted with its situation and quality, its advantages and disadvantages, and state that they know its value, although they may not have been engaged in buying and selling land, and they have no knowledge of an actual sale of the land in question, or of similar land. *Id.*

ENTICEMENT.

See CRIMINAL LAW.

EQUITY.

SUITS AFFECTING LANDS IN ANOTHER STATE, JURISDICTION OF EQUITY IN. — IN CASES OF CONTRACT, TRUST, OR FRAUD, THE EQUITY COURTS of one state or country having jurisdiction of the parties are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another state or country. But this jurisdiction is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience, and the decree in such suit imposes a mere personal obligation, enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction, to create, transfer, or vest a title. *Lindsey v. O'Reilly*, 802.

See INJUNCTIONS.

ESTATES.

1. **TENANCY FOR LIFE — EMBLEMENTS.** — If tenant for life sows the land, but dies before the crop matures, his executor is entitled to the emblements

- or profits of such crop; and this right cannot be defeated by evidence of the condition of the tenant's health at the time of planting the land, or by his or his lessee's declarations imputing belief, however well founded, or knowledge, if possible, that the tenant's life would not continue until the maturity of the crop. *Bradley v. Bailey*, 316.
2. **TENANCY FOR LIFE — EMBLEMENTS.** — Right of executor of tenant for life to the crop planted by the latter during his lifetime does not depend upon whether the land was cultivated in a husband-like manner, or the crop planted in the customary way. *Id.*
 3. **AN ESTATE IS A CONDITIONAL FEE, AND NOT AN ESTATE-TAIL**, where it is conveyed by warranty deed, in which a condition is written, after the description, that, in case of death of grantee without children, the land, or the proceeds arising from sale or otherwise, should fall back to the grantor's lawful heirs, and in case grantee's guardian should see fit, he might sell the land, provided the proceeds of the sale were devoted to grantee's use during her life, and after her death without heirs of her body, then the balance should be applied to grantor's heirs; to the lawful heirs of the grantor in such deed, whether considered as a conditional limitation or as a contingent remainder, is void. *Outland v. Bowen*, 420.
 4. **ESTATE-TAIL, WHEN CREATED.** — Whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate-tail. But it is well settled, on the other hand, that if it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as an estate-tail. *Id.*
 5. **ESSENTIAL DIFFERENCE BETWEEN AN ESTATE UPON CONDITION AND AN ESTATE IN FEE**, which determines upon the happening of some future uncertain but possible event, with a limitation over, conditioned upon the happening of the event, is, that in the latter case, upon the happening of the event, the estate either reverts to the grantor, or is carried by force of the deed to the person to whom it was granted; while in the former, the grantor must have, either expressly or by necessary implication, reserved to himself or his heirs a right of entry, upon breach of the condition, re-entry being necessary to revest the estate. *Id.*
 6. **A CONDITIONAL LIMITATION IS AN ESTATE LIMITED** to take effect after the determination of an estate, which, in the absence of a limitation over, would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation. *Id.*
 7. **A REMAINDER CANNOT BE LIMITED TO TAKE EFFECT AFTER A FEE**; or in other words, "where there is no reversion there can be no remainder." *Id.*
 8. **WHETHER A LIMITATION IS VALID OR NOT IS TO BE DETERMINED BY THE DEED ALONE**, and not by what might have happened, nor by what actually did happen. When the existing state of things at the time of its execution is disclosed, the deed must be left to speak for itself. *Id.*
 9. **VOID LIMITATION, EFFECT OF.** — When a limitation over is void, the estate of the first taker continues unimpaired. The rule applicable to such cases is, that a conveyance in fee, which by a subsequent condition is subject to an executory interest or limitation, which is void by reason

of remoteness or on account of its being impossible or repugnant, creates an estate in the first taker which becomes vested as a fee-simple absolute.
Id.

10. AN ESTATE IN FEE CANNOT BE LIMITED UPON AN ESTATE IN FEE BY AN ORDINARY DEED of conveyance in Indiana, except as authorized by the Revised Statutes of 1881, section 2962, whether the limitation over be in the nature of a conditional limitation or a contingent remainder or use.
Id.

ESTATES FOR LIFE.

See ESTATES, 1, 2.

ESTATES OF DECEDENTS.

See PARENT AND CHILD; WILLS.

ESTATES-TAIL.

See ESTATES.

ESTOPPEL.

1. STATEMENT, TO OPERATE AS ESTOPPEL, MUST BE MADE WITH EXPRESS INTENTION TO DECEIVE, or with such carelessness or culpable negligence as to amount to constructive fraud. *Montgomery v. Keppel*, 125.
2. ESTOPPEL — LACHES. — GRANTOR WHO CLAIMS THAT A DEED SIGNED BY HIM WAS PROCURED BY FRAUD, and who knows that the grantee is trying to sell the property, but remains inactive until after a sale thereof is effected, is estopped from maintaining an action against an innocent purchaser to vacate the deed, though he (the grantor) has remained in possession. *Hafter v. Strange*, 659.

See ATTACHMENT AND GARNISHMENT, 3; INFANCY, 2; JUDGMENTS; PLEDGE, 3.

EVIDENCE.

1. RES GESTÆ, DECLARATION WHEN NOT PART OF. — Where, in an action against a railway company to recover the value of a jack that died while being carried over the defendant's road, the evidence shows that a tramp having a stick in his possession was found in the car with the jack and other animals therein, and the jack was, after the tramp's removal from the car, found dead in the car, with blood running from his mouth and nose, a declaration made in the presence of the conductor of the train, by the tramp soon after his removal from the car, "if it had not been for lopping them mules over the head, I would have froze to death," is not admissible as part of the *res gestæ*. *St. Louis I. M. Co. v. Weakly*, 397.
2. EVIDENCE. — GENERAL OBJECTION TO EVIDENCE, some parts of which are competent, may be overruled entirely. *Cannon v. Lindsey*, 38.
3. RES GESTÆ. — IN ORDER THAT THE DECLARATIONS OF A PARTY MAY BE ADMISSIBLE in evidence as part of a transaction, they must grow out of the principal fact or transaction, illustrate its character, be contemporaneous with it, and derive some degree of credit from it. *Bush v. Roberts*, 741.
4. DECLARATIONS OF A GRANTOR MADE PRIOR TO HIS TRANSFER are not admissible against his grantee in an action by the creditors of the former to set aside the transfer for fraud, where it appears that the grantee was

a purchaser for full value, and there is no other testimony tending to establish any complicity on his part in the grantor's fraudulent design. *Id.*

5. EVIDENCE — DECLARATIONS. — IN ACTION TO RECOVER PROCEEDS OF SALE of a bond claimed to have been placed in defendant's hands, but which bond defendant claims plaintiff never had, and that the whole story is a fabrication of recent origin, plaintiff may prove, for the purpose of showing that she was the owner of such bonds long before the present action was commenced, that on delivering a package to a friend, she told her to keep it in a safe place; that it contained such bonds; also that, four years before, she stated to a witness that she owned such bonds; and such declarations are admissible, notwithstanding the absence of defendant when they were made. *Card v. Foot*, 311.
6. EVIDENCE. — ONE'S BOOK OF ACCOUNTS IS NOT EVIDENCE IN HIS FAVOR touching the receipts of money by him. *Oberg v. Breen*, 779.
7. THE ADMISSION IN EVIDENCE OF AN UNAUTHENTICATED LETTER is not error sufficient to warrant a reversal therefor, when such letter only goes in proof of a fact already sufficiently proven by testimony admitted without objection. *Brown v. State Ins. Co.*, 495.
8. EVIDENCE THAT OTHER RAILWAYS MAINTAINED BRIDGES SIMILAR TO THAT BY WHICH PLAINTIFF WAS INJURED is not admissible. *Louisville etc. R. R. Co. v. Wright*, 432.
9. COMPROMISE, OFFER OF, CONTAINED IN A LETTER IS NOT ADMISSIBLE IN EVIDENCE; nor are admissions in such letter competent when not made as independent facts, simply because they are facts. *Id.*
10. EVIDENCE. — PHYSICIAN who has practiced medicine and surgery for more than twenty years, and who had attended plaintiff professionally for some two months after his injury, may, after stating in detail his condition and the character and condition of his wounds at the time he attended him, give his opinion as to the probable results of the plaintiff's injuries; and a hypothetical question involving the facts stated by such physician may properly be propounded to another physician. *Id.*
11. EVIDENCE. — FOR THE PURPOSE OF SHOWING NOTICE TO RAILROAD COMPANY THAT LOW BRIDGE WAS DANGEROUS, it is competent, in action for damages for injury caused thereby, to show that on prior occasions other persons on the top of moving trains were injured thereby, and that some of them died in consequence. *Id.*

See AGENCY, 5; ATTACHMENT AND GARNISHMENT, 5; DAMAGES; NEGLIGENCE; PARTNERSHIP; PHYSICIANS; TRESPASS, 2; WILLS; WITNESSES.

EXECUTIONS.

1. JURISDICTION OF JUDGE CONTINUES UNTIL ALL ORDERS CONCERNING PROPERTY OF EXECUTION DEBTOR HAVE BEEN OBEYED, where proceedings in aid of execution are regularly instituted before him, and the execution debtor is ordered to deliver certain property, and pay certain money to a receiver duly appointed therein. *In re Morris*, 512.
2. EXECUTION ISSUED WITHOUT OFFICIAL SEAL MAY BE AMENDED by order of court requiring the clerk to affix the seal, and the amendment will have relation to the date of the writ. And the power of the court to amend the writ is in no way affected by the fact that a bond is given to stay proceedings under the execution, during the pendency of an application to quash it for want of the seal. *Hall v. Lackmond*, 84.

3. COSTS OF PROCEEDING MAY BE ADJUDGED AGAINST PARTY MOVING TO QUASH WRIT OF EXECUTION, on the ground that it was issued without affixing the clerk's seal thereto. *Id.*
4. AN EXECUTION SALE MAY, ON MOTION, BE SET ASIDE, TOGETHER WITH THE LEVY ON WHICH IT IS BASED, by the court out of which the writ issued, when all the parties are before the court, and the process has been used for, and the sale under it accomplishes, fraud, injustice, or oppression. *Voorhis v. Terhune*, 781.
5. A LEVY ON STOCK IN CORPORATION AND A SALE THEREUNDER WILL BE VACATED ON MOTION, if the statute prescribing the mode of the levy is not followed, as where no notice of the levy is given to any officer of the corporation which issued the stock. *Id.*
6. EXECUTION SALE, PRESUMPTION IN FAVOR OF. — Officer having sold land under execution, law presumes, in the absence of all testimony to the contrary, that he did his duty by levying the execution while in full force, and the silence of his return upon that subject is not sufficient to repel the presumption. *Green v. Wintersmith*, 613.
7. EXECUTION SALE — WAIVER OF LEVY AND ADVERTISEMENT. — Defendant in execution may waive levy upon the property and an advertisement of it by the sheriff, and such waiver will estop him from objecting to the sale, and from setting it aside after it has been made. *Id.*
8. JUDGMENTS AND EXECUTIONS THAT HAVE BEEN SET ASIDE ARE NO DEFENSE to the parties who had them entered and issued, in an action subsequently brought to recover damages for the seizure of property under said executions. *Anderson v. Sloane*, 885.
9. MEASURE OF DAMAGES FOR WRONGFUL SEIZURE OF PROPERTY UNDER EXECUTION. — Where property of the plaintiff, consisting of a stock of goods in a store, has been seized under executions which the defendant caused to be issued, acting in good faith and without malice or intent to oppress the plaintiff, and afterwards returned to the plaintiff or his assignee, the plaintiff having in the mean time made a voluntary assignment for the benefit of his creditors, the jury, in an action to recover for such seizure, should, in assessing the damages, be restricted to these items: 1. Interest on the value of the goods seized during the time they were held by the sheriff, or, at the option of the plaintiff, in lieu of such interest, the value of his business during that time; 2. Any depreciation in the value of the goods during that time; 3. Any expenses to which the plaintiff was put in obtaining a return of the goods, including what he was obliged to pay for costs in the illegal judgments, and the alleged sheriff's fees charged for executing the illegal executions, expenses to which he had been put by way of rent of the store and clerk's hire while the defendant was in possession of the store, and money that he was compelled to expend for counsel and attorney's fees in the proceedings to set aside the illegal judgments and executions. But no damages should be allowed for any supposed loss of profits from the interruption of the plaintiff's business for any time after the goods were restored to him or his assignee, for any loss that happened to him by reason of his assignment, nor for injury to his feelings. *Id.*
10. EXECUTIONS. — GENERAL RULE IS, THAT PURCHASER AT EXECUTION SALE ACQUIRES whatever estate and interest the defendant in execution owns and possesses, and succeeds to his title and rights, including the right of possession. *Cotton v. Carlisle*, 29.

11. **EXECUTION SALE.—THERE IS NO WARRANTY OF TITLE BY SHERIFF** at an execution sale. The purchaser takes just what title the defendant in the execution has, and buys at his peril. The rule of *caveat emptor* applies to him. *Green v. Wintersmith*, 613.
12. **SHERIFF'S DEED TO PURCHASER AT EXECUTION SALE TRANSFERS** all the title which the defendant held when the execution lien attached, and takes precedence over subsequent liens and transfers. To this extent the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created. The fact that the purchaser at a second sale, under another execution against the same defendant, first obtained a deed gives him no advantage. *Id.*
13. **QUITCLAIM DEED EXECUTED BY PURCHASER OF LAND AT SHERIFF'S SALE AFTER TIME FOR REDEMPTION HAS EXPIRED**, and before the sheriff's deed is given, is equivalent to an assignment of the sheriff's certificate of sale; and if the sheriff afterwards executes a deed to the purchaser, the same is void as between the parties. *Ward v. Dougherty*, 151.
14. **REDEMPTION OF REAL ESTATE FROM EXECUTION SALE—INJUNCTION AGAINST SHERIFF — FRAUDULENT CONVEYANCE.** — Statutory right of redemption can be exercised only within the period and in the manner prescribed by the statute creating it. But this right is entirely distinct from the purely equitable right which a fraudulent grantee has to discharge a lien upon real estate existing by virtue of a judgment obtained by the creditors of the fraudulent grantor against the latter. And a court of equity will interfere by injunction to prevent the sheriff, at the expiration of the year allowed by statute to redeem, from executing a deed under the execution sale of the land, if the fraudulent grantee's right to discharge the judgment creditor's lien upon the land depends upon an action which he is contesting in good faith, and which action has not been determined when the deed is about to be made; but upon its determination and the judgment being affirmed the grantee may then discharge the lien, and the decree in effect makes the injunction perpetual. *Teabolt v. Jaffray*, 466.

See EXEMPTIONS; HOMESTEADS; PARTNERSHIP; SUBROGATION, 2.

EXECUTORS AND ADMINISTRATORS.

1. **POWER OF EXECUTOR TO SELL LANDS ARISES BY IMPLICATION, WHEN.** — Where a testator imposes upon his executor trusts to be executed or duties to be performed which cannot be executed or performed without an estate in his lands or a power of sale, although no estate or power be expressly given by the will, the executor will take by implication an estate in the lands, or at least a power of sale, sufficient to enable him to execute the trusts or perform the duties imposed upon him, and in either event his deed will convey the legal title. And if such a conveyance be prematurely made, or for an inadequate consideration in breach of trust, the title will nevertheless be good at law, and the relief will be in equity, and at the instance only of the *cestui que trust* whose interests have been prejudiced thereby. *Lindley v. O'Reilly*, 802.
2. **EXECUTOR ACTING WHERE HIS INTERESTS ARE CONFLICTING.** — If an executor, having in his hands funds of the estate, advises the widow of the decedent, who is acting both for herself and as guardian of a legatee, to invest moneys of the estate coming to them in certain stocks and mortgages, and he, unknown to her, receives a commission for disposing of such stocks and mortgages, she has the right, on discovering that the

executor acted from motives of self-interest, to repudiate and rescind the transaction on behalf of herself and the legatee whom she represents as guardian. *Potter's Appeal*, 272.

3. **EXECUTOR AND ADMINISTRATOR — REPUDIATION OF PAYMENT OF LEGACY — RIGHT OF, LOST BY DELAY.** — Where an executor sells a railroad bond in which he has no interest to a widow, as guardian, as payment to a legatee, she cannot repudiate the purchase after three years' delay, though she might have repudiated it at the time of the transaction, as property in which she had no right to invest guardian funds. *Id.*
4. **EXECUTOR AND ADMINISTRATOR — PARTIAL ACCOUNTING NOT CONCLUSIVE.** — Where an executor has made a partial accounting, without the presence of or notice to the parties interested, and not otherwise passed upon by the court than by its acceptance of it, the question of allowance or disallowance of items included in that accounting is an open one on the final accounting. *Id.*
5. **EXECUTORS AND ADMINISTRATORS — PRESENTATION OF CLAIM AGAINST ESTATE.** — Where the president of a corporation is executor and principal legatee under his father's will, and also custodian of a note given by the latter in favor of such corporation, the knowledge and possession of the note as president of the corporation is knowledge and possession of it as executor, so that no formal presentation is necessary in order to make the note a valid claim against the estate; and it makes no difference that such executor kept the fact that he was custodian of the note secret from the corporation until after the time for presenting claims against the estate had expired. *Brown v. Brown*, 307.
6. **EXECUTORS AND ADMINISTRATORS — AGREEMENT BY EXECUTORS BINDING AGAINST ESTATE.** — Where, in an action on a note against an estate, the executors agree in writing that plaintiff take judgment for the amount of the note, with certain limitations on the use of such judgment, this is binding against the estate, as an admission, and admissible in evidence, that the note had been properly presented against the estate, and also of its liability upon the note in suit. *Id.*
7. **SURETIES OF AN ADMINISTRATOR ARE IN PRIVACY WITH HIM, AND ARE BOUND BY ANY LAWFUL ORDER** made by the surrogate to which the administrator is a party, unless obtained by collusion between him and the heirs or creditors of the estate. Their bond contemplates that they shall remain sureties as long as the surrogate retains jurisdiction of the proceedings in the administration of the estate, and has power to make valid orders therein affecting the property administered upon. *Deobold v. Opperman*, 760.
8. **SURETIES ON AN ADMINISTRATION BOND ARE NOT ENTITLED TO NOTICE OF PROCEEDINGS** in the administration of the estate. *Id.*
9. **CONTRACT BETWEEN AN ADMINISTRATOR AND HIS SURETIES, THAT THE LATTER MAY RETAIN POSSESSION OF THE FUNDS OF THE ESTATE** to secure them from the possibility of loss as such sureties, is illegal and void. *Id.*
10. **EMPLOYMENT BY ADMINISTRATOR OF FUNDS OF THE ESTATE** in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial, or manufacturing enterprises or speculative adventures, is illegal, and a *devastavit* of the estate. *Id.*
11. **SURETIES OF AN ADMINISTRATOR REMAIN LIABLE, NOTWITHSTANDING A DECREE** adjusting his accounts and discharging him and them from liability, if such decree is afterwards vacated for fraud and misrepresentation, though without notice to them, and though they, in the mean time,

acting in good faith and in reliance upon such decree, have paid over to the administrator the funds of the estate, which he had pursuant to agreement placed in their hands to secure them from liability as his sureties. *Id.*

12. A PARTY IS NOT DEFRAUDED WHEN INDUCED BY ARTIFICE TO DO that which the law would have compelled him to do. *Id.*

EXEMPTIONS.

1. ACTION FOR DAMAGES MAY BE MAINTAINED BY DEBTOR AGAINST CREDITOR FOR WRONGFULLY PREVENTING DEBTOR FROM OBTAINING BENEFIT OF EXEMPTION LAWS as to his personal earnings, by the creditor's making a pretended assignment of his claim, without consideration, for the purpose of evading the exemption laws of the state in which the creditor and debtor both resided, to a citizen of another state who brought action thereon in the latter state, and caused the debtor's wages, payable by a railroad company there, to be taken and appropriated by process of garnishment, as it was possible to do by the laws of such latter state. *Stark v. Bare*, 537.
2. EXEMPTIONS. — HORSE, WAGON, AND HARNESS belonging to a single man engaged in assaying, sampling, and working ores, and necessary for the purpose of carrying on his trade and business, are exempt from execution under section 32, page 602, General Statutes of Colorado, exempting from levy and sale the tools, implements, working animals, and stock in trade, not exceeding three hundred dollars in value, of any mechanic, miner, or other person, not the head of a family, and used and kept to carry on his trade and business. *Id.*
3. JUDGMENT AGAINST OFFICER FOR SEIZING EXEMPT PROPERTY is error, where such officer has released a portion of the property seized, and the evidence fails to show that the released property in value did not reach the limit allowed by the statute as exempt from execution. *Id.*

FISHERIES.

See WATERS, 13, 14.

FRANCHISES.

1. GRANT OF FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY WILL BE CONSTRUED AS AN IRREVOCABLE GRANT IN PERPETUITY, though the corporation to which it is granted was created for a limited period only. *People v. O'Brien*, 684.
2. FRANCHISE TO CONSTRUCT AND MAINTAIN A STREET-RAILWAY is not a mere license or privilege enjoyable only during the life of the grantee, and revocable at the will of the state. It has been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term. *Id.*

See CORPORATIONS.

FRAUD.

See CONTRACTS.

FRAUDULENT CONVEYANCES.

1. EQUITY. — COURT OF EQUITY WILL SET ASIDE CONVEYANCE AT INSTANCE OF GRANTOR, although it was intended to defeat the law, if the parties

- did not stand upon an equal footing, and the conveyance was procured through the false representations of the grantee. In such case, the parties are *in delicto*, but not *in pari delicto*. *Harper v. Harper*, 583.
2. CONVEYANCE BY AGED MOTHER OF BULK OF HER ESTATE TO HER SON, INDUCED thereto by the latter's false and fraudulent representation that a suit for slander was about to be commenced against her, which would result in the loss of all her property, will be set aside at the instance of the grantor. *Id.*
 3. FRAUDULENT CONVEYANCES. — CONVEYANCE OF LAND BY INSOLVENT FATHER TO HIS SON, IN CONSIDERATION of the latter's promise to support and maintain the former and his wife during their natural lives, is fraudulent *per se*, and void as to existing creditors of the grantor, and the grantee cannot be regarded as a *bona fide* purchaser. *Woodall v. Kelly*, 57.
 4. WANT OF CONSIDERATION IN DEED MAY BE SHOWN, NOTWITHSTANDING RECITAL THEREOF, in connection with and as a part of the fraud which is charged in obtaining the deed. *Brison v. Brison*, 190.
 5. VOLUNTARY CONVEYANCE TO A WIFE OR CHILD IS FRAUDULENT AS TO PRE-EXISTING CREDITORS, if made when the donor is in embarrassed financial circumstances, even though he retains estate nominally equal in value to, or more than equal to, all his indebtedness, when the property retained proves insufficient to discharge all his liabilities. *Marmon v. Harwood*, 345.
 6. FRAUDULENT CONVEYANCE — WHAT MAY HAVE BEEN ACTUALLY PASSING IN GRANTOR'S MIND IS IMMATERIAL. — If a conveyance is voluntary, and results in hindering, delaying, or defrauding creditors, it must be regarded as fraudulent in law; the donor's act need not be immoral or corrupt. *Id.*
 7. VOLUNTARY CONVEYANCE — CREDITOR'S BILL — GRANTEE'S MOTIVE UNIMPORTANT. — Where bill is brought to impeach voluntary conveyance by a debtor, the motive of grantee does not determine validity of transfer, except, perhaps, in cases where he parts with a valuable consideration. *Id.*
 8. GRANTOR CANNOT AVOID HIS DEED AS FRAUDULENT WHEN HE MADE IT FOR THE PURPOSE OF COERCING A COMPROMISE with creditors, and with the expectation of receiving a reconveyance when this purpose should be accomplished. This result is not varied by the fact that the conveyance was advised by a person other than the grantee, and such person promised that the reconveyance should be made. *Moore v. Jordan*, 641.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GROWING CROPS.

See LANDLORD AND TENANT, 6, 7.

GUARANTY.

1. CONTRACT OF GUARANTY DOES NOT TERMINATE WITH THE LIFE OF THE GUARANTOR, unless this intention is plainly expressed in the guaranty itself. *Kernochan v. Murray*, 744.
2. GUARANTY MADE BY PERSONS ACTING FOR AN UNDISCLOSED PRINCIPAL is an original and not a collateral undertaking. Their liability is not that of sureties, but of principals. *Id.*

HABEAS CORPUS.

1. HABEAS CORPUS. — JURISDICTION OF COURT TO COMMIT CAN BE QUESTIONED ON HABEAS CORPUS; but the regularity of the proceedings cannot be inquired into. *In re Morris*, 512.
2. HABEAS CORPUS. — The detention of the prisoner was justified under an ordinance, for the violation of which she had been arrested. The substance of the ordinance is stated in the *syllabus*. The prisoner was remanded to the custody of the city marshal, and therefore appealed. *Ex parte O'Leary*, 640.

HOMESTEADS.

1. HOMESTEAD CAN BE CLAIMED IN THAT PORTION OF PREMISES ONLY WHICH IS OCCUPIED AS FAMILY RESIDENCE, where there were a front and rear house on a lot of land, separated by a fence and independent of each other, and the claimants resided in the rear house, and rented the front house to tenants. *Maloney v. Hefer*, 180.
2. HOMESTEAD EXEMPTION NOT LOST BY TEMPORARY REMOVAL THEREFROM. Where a woman, residing with her husband and children in rooms over a saloon adjoining a dance-hall on the same lot, after his death not wishing to keep a saloon, or to have her children occupy rooms over one, removes from the building, leaving some furniture therein, and rents the same, but always intending to return and live in it, at all events as soon as her daughters married, the exemption of the premises from execution, as her homestead, is not impaired by her removal. *McDermott v. Kernan*, 864.
3. HOMESTEADS. — DEED BY HUSBAND ALONE TO HOMESTEAD, OR BY HUSBAND AND WIFE JOINTLY, WITHOUT ASSENT and signature of the wife properly acknowledged by her as the statute requires, is a mere nullity; and a subsequent acknowledgment by her, correcting imperfections of the first, cannot operate retrospectively to take away intervening rights which vested before the acknowledgment was perfected. *Smith v. Pearce*, 44.
4. HOMESTEAD. — VERBAL AGREEMENT BY HUSBAND TO SELL HOMESTEAD, RECEIVING PART OF PURCHASE-MONEY, and allowing the vendee entrance to a part of the dwelling-house, himself and family continuing to occupy some rooms thereof, under an agreement to pay rent for them to the vendee, does not constitute an abandonment by the husband of his right of homestead in the premises, nor enable him to sell and convey without the voluntary assent and signature of the wife. *Id.*
5. JUDGMENT OF FORECLOSURE AGAINST SURVIVING WIFE SUED SOLELY AS EXECUTRIX OF HER DECEASED HUSBAND DOES NOT AFFECT HER INDIVIDUAL RIGHTS in the mortgaged premises as a homestead, notwithstanding she sets up in her answer the fact of her declaration of homestead on the property. *Stockton B. & L. Ass'n v. Chalmers*, 173.
6. LEVY OF ATTACHMENT ON LAND CLAIMED AS HOMESTEAD CREATES LIEN THEREON, under the Arkansas act of 1852, and this lien, unless waived by laches on the part of the judgment creditor, may be enforced by him when the homestead right ceases. Such lien is superior to that of a subsequent mortgage. *Brandon v. Moore*, 96.

HUSBAND AND WIFE.

1. RELATION OF HUSBAND AND WIFE IS CONFIDENTIAL in their transactions with each other, under section 158 of the Civil Code of California. *Brisson v. Brisson*, 190.

2. **HUSBAND AND WIFE — WIFE, WHEN MAY TESTIFY AGAINST HUSBAND. —** Wife having a claim as creditor against the insolvent estate of her husband may testify against him, as to the character of the various transactions out of which her claim arises, and as to conversations which took place between herself and husband in the absence of other witnesses in relation to such claim. Such conversations are not privileged communications. *Spitz's Appeal*, 303.
3. **HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE. —** Connecticut statutes of 1877, General Statutes 1888, section 2796, provide that all property owned by the wife when she marries shall remain her sole and separate estate. Prior to its adoption the wife had in equity all the rights of a *feme sole* in respect to such estate, including the right to make any contracts in relation thereto with her husband, and though the statute provides that she may contract with others, it is silent as to her capacity to contract with her husband; but such silence cannot be construed as implying an impairment of her prior right to enter into such contracts. Therefore, a woman married since the adoption of such act retains such right. *Id.*
4. **HUSBAND AND WIFE. — RULE THAT WIFE SHALL NOT TESTIFY** against husband is founded upon their legal unity and the policy of preventing discord between them, but it is not applicable to actions at law in which the husband and wife have conflicting interests and are opposing parties, as in divorce actions, suits by the wife seeking protection against the husband, or suits in equity relating to the wife's separate estate. *Id.*
5. **USE OF WIFE'S MONEY BY HUSBAND WITH HER CONSENT. —** Where a husband collects his wife's money, and, without objection on her part, uses it as his own for more than ten years, obtaining credit on the faith of its being his own, she cannot afterwards assert her claim to it or to its proceeds against his creditors. *Driggs & Co. Bank v. Norwood*, 78.
6. **VOLUNTARY ALIENATION OF HIS PROPERTY BY EMBARRASSED DEBTOR IS PRESUMPTIVELY FRAUDULENT** as against existing creditors. Indebtedness raises a presumption of fraud, which becomes conclusive upon insolvency. But a voluntary conveyance by a person in debt is not *per se* fraudulent as to subsequent creditors; to make it so they must prove actual or intentional fraud. *Id.*
7. **PROPERTY CONVEYED TO WIFE, WHEN SUBJECTED TO SATISFACTION OF HUSBAND'S DEBTS. —** Where a husband makes a voluntary post-nuptial settlement upon his wife, by having conveyed to her real estate exceeding in value the rest of his property, at a time when he is largely insolvent as an individual, and the firm of which he is a member is on the brink of ruin, the deed to her not being acknowledged by the grantor so as to entitle it to record until about two years after its execution, and after the commencement of a suit by his creditors to subject the property to the satisfaction of their debt, and where, shortly after the transfer, his firm contracts a debt of considerable magnitude to the creditors seeking to subject the property to the satisfaction of their debt, at a time when he had no reasonable ground to believe that he would be able to pay the same, the transaction wears the badge of fraud, and the property so conveyed will be subjected to the payment of the debts of said creditors. *Id.*
8. **SURVIVING HUSBAND HAD POWER, UNDER ACT OF CALIFORNIA OF 1850, TO KEEP ALIVE COMMUNITY DEBT** existing at the death of the wife, and secured by mortgage upon the community property, by renewals, exten-

sions, and substitutions of the debt and the security, and the wife's descendants were bound by his acts in this regard; but he had no power to bind the interests of the descendants by a mortgage of the property for a debt contracted by him after the dissolution of the community. *Johnston v. S. F. Sav. Union*, 129.

See FRAUDULENT CONVEYANCES; HOMESTEADS.

INFANCY.

1. ACTION TO QUIET TITLE TO LAND OWNED BY INFANT may be maintained by guardian, where notice of intention to hold a mechanic's lien thereon has been filed. *Alvey v. Reed*, 418.
2. INFANT CANNOT BE ESTOPPED FROM ASSERTING HIS TRUE AGE, nor from avoiding his contract by pleading his disability. *Id.*

See COMMON CARRIERS.

INJUNCTIONS.

1. INJUNCTION. — BILL IN EQUITY WILL LIE AT SUIT OF LESSEE, WHO CLAIMS EXCLUSIVE RIGHT to carry on a particular business on the leased premises, to restrain, by injunction, another lessee, having notice of the complainant's right, from so using his own rented premises as wrongfully to disturb such right. But the lessee defendant having subleased to another, allowing him to carry on the business in violation of the complainant's exclusive right, a temporary injunction, as against said lessee, is properly dissolved, when not kept in force by the complainant against the sublessee, who actually carried on the business. *Clay v. Powell*, 70.
2. LEASED PREMISES, INJUNCTION AGAINST USE OF IN VIOLATION OF TERMS OF LEASE. — Equity will interfere by injunction, on behalf of the lessor, to prevent the lessee and sublessee from continuing an unauthorized use of the leased premises, notwithstanding the lessor may have a right of re-entry or an action for damages, where a building, designed and constructed for use as a hotel, is leased by the owner for that purpose, with a covenant that the lessee shall not sublet the premises without the consent of the lessor, and the lessee, without the consent of the lessor, sublets a portion of the hotel office, to be used for carrying on a real estate and brokerage business, which detracts from the reputation and popularity of the house, and impairs its value as a hotel. *Id.*
3. INJUNCTION WILL ISSUE TO PREVENT VEXATIOUS LITIGATION AND A MULTIPLICITY OF SUITS, or to restrain a trespass continuous in its nature, as where repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive or inflict irreparable injury. Hence, where a company engaged in the business of buying and crushing cotton-seed was in the habit of sending out sacks to farmers to be filled and reshipped to it, and another company engaged in the same line of business willfully and persistently procured the sacks so distributed, and used them for their purposes, and, though repeated actions of replevin had been prosecuted against them, persisted in their purpose, it was adjudged that an injunction ought to issue to prevent a further repetition of these wrongs. *Mills v. New Orleans Seed Co.*, 671.

See EXECUTIONS, 14; PARTNERSHIP, 9, 11; RAILROADS, 1, 2.

INSANITY.

See WILLS, 1-5.

INSOLVENCY.

See SALES, 5.

INSURANCE.

1. **INSURANCE. — IF INSURANCE COMPANY, BY ITS HABITS AND COURSE OF BUSINESS, CREATES** in the mind of the policy holder a belief that payment of premiums may be delayed until demanded, or otherwise waives the right to demand a forfeiture, this is binding on the company, notwithstanding the policy expressly stipulates that it shall be void on non-payment of premiums when due. *Home P. Co. v. Avery*, 54.
2. **INSURANCE — WAIVER OF MISREPRESENTATIONS IN POLICY.** — If a married woman, though living apart from her husband, represents in her application for life insurance that she is a widow, this is sufficient misrepresentation to avoid the policy; but if the clerk of the insurance company is afterwards informed that she is a married woman, and the company levies and collects two assessments on the policy, this constitutes a waiver of its right to avoid the policy. *Fitzpatrick v. Hartford L. I. Co.*, 288.
3. **INSURANCE — NOTICE TO CLERK IS NOTICE TO COMPANY.** — If a married woman, though living apart from her husband, represented in her application for life insurance that she was a widow, and assigned her policy for a valuable consideration, after which the assignee informed the company that the insured had a husband living, and desired to know if he could claim the insurance, whereupon the company's secretary referred the inquirer to one of its clerks who informed him that the fact that the husband was living could make no difference, and the company afterwards levied and collected two assessments on the policy, notice to the clerk was notice to the company, and it, by its acts, in effect entered into a new contract of insurance. *Id.*
4. **INSURANCE — ASSIGNMENT OF POLICY FOR SUPPORT VALID.** — The assignment by a laboring woman, living apart from her husband, of her life insurance policy, made in good faith and not as a wager, upon consideration that the assignee, a distant relative, will supply her with a home and proper care and support for life, is valid. *Id.*
5. **AGENT OF FIRE INSURANCE COMPANY MAY WAIVE FORFEITURE** where claim for loss has been placed in his hands for adjustment. It will be presumed that he was authorized to do whatever was required to be done in adjusting the loss. *Brown v. State. Ins Co.*, 495.
6. **WAIVER OF FORFEITURE FOR BREACH OF CONDITION OF INSURANCE.** — Where company has knowledge that insured has broken condition in policy requiring him to keep his books and invoices so as to protect them from fire, and that the books are burned in consequence, it waives the forfeiture if it requires the insured to furnish it with copies of such books and invoices for their examination, and induces him to incur labor and expense in procuring them. *Id.*
7. **INSURANCE — STIPULATIONS SEEKING TO MAKE AGENT OF INSURER THE AGENT OF THE ASSURED.** — An agent who solicits insurance for an insurance company and fills in blanks in a printed form of application is the agent of the company, and not of the insured, in the taking of the application, although there is a stipulation on the face of the application that the statement is the statement of the insured, and the questions are answered by the insured or by his authority; and if the agent writes

down false answers without the knowledge of the insured, after he has been truthfully informed by the insured of the condition of the premises, and had personally inspected the same, the insured should not suffer for his misrepresentations, notwithstanding the insured signed the application, and the policy made the representations in the application warranties. *Continental Ins. Co. v. Pearce*, 557.

8. **INSURANCE COMPANY IS ESTOPPED FROM DENYING TRUTH OF STATEMENTS FALSELY FILLED IN BLANKS IN PRINTED FORM OF APPLICATION BY ITS AGENT** without the knowledge of the insured, although the insured signed the application, the agent having been truthfully informed by the insured of the condition of the premises, and having personally inspected the same, where the company receives the premium, and issues a policy, and a loss occurs. *Id.*
9. **STATEMENT OF AGENT OF INSURANCE COMPANY UPON BACK OF BLANK APPLICATION IN ANSWER TO CERTAIN PRINTED QUESTIONS TO SUCH AGENT** concerning the property insured are admissible in evidence to show that the agent knew the condition of the property, and filled in the application with a view of obtaining the premium rather than of correctly transcribing the answers of the insured. *Id.*
10. **POLICY IS NOT AVOIDED BY FALSE STATEMENTS IN APPLICATION**, under a provision that the statements contained in the application are warranties and if any of them are false the policy shall be void, when the false statements in the application are made by the agent of the insurance company, without the knowledge of and without any fraud or attempt to deceive or misrepresent on the part of the insured. *Id.*
11. **LIFE INSURANCE. — MUTUAL BENEFIT SOCIETY IN MAKING ASSESSMENTS UPON ITS MEMBERS** does not act in a judicial but in a ministerial capacity, and no presumption can arise in favor of the regularity or legality of its assessments. *American M. A. Soc. v. Helburn*, 571.
12. **LIFE INSURANCE. — WHEN MUTUAL BENEFIT SOCIETY RELIES UPON FAILURE OF ANY MEMBER** to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the mode pointed out in the charter; otherwise the member cannot be said to be in default. *Id.*
13. **LIFE INSURANCE. — AVERMENT IN PLEADING THAT CERTAIN ASSESSMENT "WAS DULY MADE** by defendant in accordance with its charter" asserts no fact, but pleads only a conclusion of law, and is radically defective. *Id.*

See CONFLICT OF LAWS.

INTERPLEADER.

INTERPLEADER WILL NOT BE COMPELLED, where the doubt as to which of two persons is liable does not arise from uncertain or unknown facts, and the only question is, what is the law applicable to conceded facts. *Board of Supervisors v. Alford*, 637.

INTOXICATION.

See CRIMINAL LAW, 3.

JUDGMENTS.

1. **JUDGMENT, FORM OF. — IN DETINUE OR CORRESPONDING STATUTORY ACTION** for the recovery of personal property *in specie*, the judgment should be

- "for the property sued for, or its alternate value, with damages for its detention to the time of trial": Alabama Code of 1886, sec. 2719. *Greene v. Lewis*, 42.
2. **JUDGMENT. — IRREGULARITY IN FORM OF JUDGMENT** which is not prejudicial to the appellant cannot be complained of as error. *Chever v. Horner*, 217.
 3. **JUDGMENT IS CONCLUSION OF LAW** in a particular case announced by the court; and if, from the record entry of what purports to be the judgment, enough is found to show that the court intended to render judgment, it will not be set aside because it is not couched in artificial and technical phraseology. *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 226.
 4. **JUDGMENT. — CORRECT CONCLUSION WILL NOT BE OVERTHROWN** because reached by illogical reasoning, or upon some grounds which are false. *Id.*
 5. **JUDGMENT RENDERED ON FINDINGS OF REFEREE** must stand, where sufficient facts are found by him to warrant the judgment, though some of his findings may have been set aside, if there is no error in applying the law to those remaining. *Id.*
 6. **JUDGMENT ON REFEREE'S REPORT. —** Where referee reports findings of law and fact, and the judgment entered thereon sets aside the findings of law, yet if they were not essential to it, and it is fairly supported by the findings of fact, it will not be reversed. *Id.*
 7. **JUDGMENT CANNOT BE ATTACKED IN COLLATERAL ACTION** on the ground that it is not supported by the findings. *Johnston v. San Francisco Savings Union*, 129.
 8. **JUDGMENT ENTERED AGAINST ONE IN HIS TRUE NAME**, who was not named as a party defendant, nor served with summons under a fictitious name, but who came in and answered, reciting that he was sued by a certain fictitious name, is binding in a collateral proceeding, although the complaint was not amended by inserting his true name. The service of summons was waived by appearance, and the failure to insert the true name in the complaint was not such an irregularity as rendered the judgment void. *Id.*
 9. **JUDGMENT UPON ONE CAUSE OF ACTION, WHEN CONCLUSIVE UPON ANOTHER. —** Judgment against defendant in an action upon one of several notes given by him in part payment of the purchase price of machinery is conclusive as to a defense set up and determined therein, so long as the judgment stands unreversed, in an action brought against him upon another of the notes by another party to whom such note had been transferred. *Furneaux v. First National Bank of Whitewater*, 541.
 10. **JUDGMENT BY DEFAULT MAY BE SET ASIDE UPON SUFFICIENT SHOWING; AND AN ASSURANCE TO AN ATTORNEY** by a judge as to the course which will be pursued in the cause, even though unauthorized, may be a good ground, if it has in good faith been acted upon by the party. So a mistake, even though it relate to a matter concerning which the party is charged by law with notice, may afford a sufficient cause. *Jean v. Hennessy*, 486.
 11. **VACATING JUDGMENT — SUFFICIENCY OF AFFIDAVIT OF MERITS. —** Such affidavit is sufficient where defendant's attorney states in effect therein that all matters alleged in the petition as grounds for the action were involved and litigated in a former action between the same parties; it is not sufficient, however, in such case for a party to rely upon a mere general statement that he has a good defense to the action, but the necessary facts must be averred. *Id.*

12. *Id.* — In such case an attorney who has full knowledge of the facts, and was engaged in the former litigation, is competent to make affidavit. *Id.*
13. AFFIDAVITS OF SERVICE OF SUMMONS BY PUBLICATION AGAINST NON-RESIDENT DEFENDANT IN ACTION FOR DIVORCE, AND RECITALS THEREOF in judgment, are conclusive upon a collateral attack. The affidavit on the application for the order of publication, and the order therefor, are not part of the judgment roll, and cannot be considered. *Newman's Estate*, 146.
14. JUDGMENT BY DEFAULT, RENDERED BEFORE TIME ALLOWED DEFENDANT TO ANSWER HAS EXPIRED, IS ERRONEOUS SIMPLY, and not void, and can be attacked only upon motion or by appeal, and by the party aggrieved. *Id.*
15. ORDER FOR ADOPTION OF MINOR IS NOT VOID BECAUSE MADE IN OPEN COURT instead of by the judge thereof at chambers, as contemplated by section 227 of the Civil Code of California; at all events, where the order was a writing signed by the judge, and filed in the adoption proceedings, although it recited that it was made "by this court." *Id.*
16. JUDGMENT OF DIVORCE, AFTER BEING SIGNED BY JUDGE AND FILED WITH CLERK, IS BINDING upon the parties and their privies, although not entered by the clerk. *Id.*
17. ESTOPPEL. — JUDGMENT QUIETING TITLE is conclusive in favor of plaintiff that he is the absolute owner of the property, and that a tax title then held by the defendant is invalid. *Reed v. Douglas*, 476.
18. ESTOPPEL. — JUDGMENT QUIETING PLAINTIFF'S TITLE concludes the defendant from asserting a title by him acquired *pendente lite*, and which he might have pleaded in the action, but did not. *Id.*

See EXEMPTIONS, 3; EXECUTIONS, 8; RES ADJUDICATA.

JURISDICTION.

COURTS OF ONE STATE HAVE NO JURISDICTION OVER TITLE TO LANDS IN ANOTHER state or country. And the clause of the federal constitution requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state is subordinate to this rule, and applies to the records and proceedings of the courts only so far as they have jurisdiction. *Lindley v. O'Reilly*, 802.

See EQUITY; EXECUTIONS, 1; WATERS, 1-3.

JURY AND JURORS.

VERDICT ARRIVED AT BY AVERAGE. — Verdict is not invalid which is obtained by aggregating amounts fixed by each juror as damages, and then by dividing the result by twelve, if such verdict is agreed to afterwards, and there was no agreement beforehand to be bound by the result so obtained. *Sullens v. Chicago etc. R'y Co.*, 501.

See NEGLIGENCE, 2.

JUSTICES OF THE PEACE.

1. JUDGMENT BY DISQUALIFIED JUSTICE VOID. — Where plaintiff's attorney, who fills up and signs the writ in the action, occupies the same office with the justice who renders the judgment, the latter is void, as such justice is disqualified to act under the act of Connecticut of 1875, chapter 27, section 1, providing that no justice shall try any civil action which shall be brought, or in which the writ or declaration shall have been

filled up by his partner, or by any one occupying the same office or apartment with him. This statute is not affected by the statute of 1882, Connecticut General Statutes, section 672, which re-enacted and repealed an earlier statute relating to the same subject, but which did not expressly or impliedly repeal the act of 1875. *Keeler v. Stead*, 320.

2. **JUSTICE OF PEACE—WAIVER OF DISQUALIFICATION.**—Connecticut General Statutes, section 676, provides that the disqualification of a justice to act in a case before him may be removed by consent of the parties in writing given in court, and this mode must be strictly followed, as no other will remove the disqualification. It cannot be removed or waived by proceeding to trial with knowledge of its existence, because the trial of the case, and judgment by the justice, are from want of power to act without legal effect, and void. *Id.*

LANDLORD AND TENANT.

1. **ON LEASE OF HOUSE OR LAND, THERE IS NO IMPLIED COVENANT THAT THE PREMISES SHALL BE FIT OR SUITABLE** for the use for which the lessee requires them, whether for habitation, occupation, or cultivation. *Murray v. Albertson*, 787.
2. **LESSEE OF A FURNISHED HOUSE IS NOT JUSTIFIED IN ABANDONING THE PREMISES, OR REFUSING TO PAY RENT THEREFOR**, by the fact that they were known to be intended for his occupation, and were in a damp and unhealthy condition, and unfit for such occupancy, there having been no misrepresentation or concealment of the state of the premises, nor any act or default of the lessor subsequent to the leasing, creating, or increasing their unfitness for occupancy. *Id.*
3. **LANDLORD AND TENANT—PATENT DEFECTS IN TENEMENT.**—Where a building with crumbling and defective walls is leased by a tenant having ample opportunity to observe and ascertain their true condition, the landlord is not liable to the tenant for damages caused the latter by the fall of such walls, in the absence of express warranty of safeness, or of fraud or misrepresentation. *Davidson v. Fischer*, 267.
4. **LANDLORD AND TENANT—DEFECTS IN TENEMENT.**—In the lease of a building there is no implied warranty that it is safe, suitable for habitation, or properly adapted to the uses to which it is applied, nor that it shall continue fit for the purposes for which it is demised. *Id.*
5. **LANDLORD AND TENANT—PATENT DEFECTS IN TENEMENT.**—Where the tenant is permitted to examine fully the condition of the tenement sought to be leased, and any defects existing therein are patent, the rule of *caveat emptor* applies, and the landlord is exempted from liability for injuries caused by such defects in the building, in the absence of warranty, fraud, deceit, or misrepresentation. *Id.*
6. **LESSOR BECOMES TENANT IN COMMON WITH LESSEE OF CROPS GROWN ON LEASED PREMISES**, where a lease of agricultural lands provides that the lessor shall receive a certain proportion of the crops grown on the leased premises after the same are harvested. *Baughman v. Reed*, 170.
7. **TENANT IN COMMON OF CROP MAY MAINTAIN ACTION FOR PARTITION THEREOF**, and the appointment of a receiver pending the action, where his co-tenant is in the sole possession of the crop, denies his right to any part of the same, and threatens to sell it and appropriate the proceeds to his own use. *Id.*

See INJUNCTIONS, 1, 2; SALES, 1.

LIBEL.

1. FROM LIBELOUS PUBLICATION THE LAW IMPLIES MALICE and infers damages. *Byam v. Collins*, 726.
2. A LIBELOUS COMMUNICATION IS REGARDED AS PRIVILEGED, if made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. *Id.*
3. WHETHER A LIBELOUS COMMUNICATION IS PRIVILEGED IS A MATTER OF LAW. *Id.*
4. IF LIBELOUS COMMUNICATION IS PRIVILEGED, THE PLAINTIFF MUST ASSUME THE BURDEN of establishing, as a matter of fact, and to the satisfaction of the jury, that it was maliciously made. *Id.*
5. LIBEL. — COMMUNICATION IS NOT PRIVILEGED BECAUSE MADE BY THE MALIGNER in the conviction that he owed a social duty to give currency to libelous rumors, that the victim of them may be avoided. *Id.*
6. A LIBELOUS COMMUNICATION IS NOT PRIVILEGED when made to an unmarried woman concerning her suitor, by the fact that she, some years before, had requested to be informed of anything the defendant knew "about any young man she went with, or, in fact, any young man in the place," if the defendant was not a relative of such young woman, and owed no special duty to her. *Id.*
7. LIBEL. — ONE WHO MAKES A LIBELOUS COMMUNICATION TO AN UNMARRIED WOMAN concerning her suitor, to break up relations which it was believed might result in their marriage, though prompted by friendship and the solicitations of mutual friends, acts at his peril, and is answerable in damages to the person maligned, if the communication, though believed to be true, is shown to have been unfounded in fact. In such a case, the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true. *Id.*
8. MALICE IS PRESUMED FROM ORAL AS WELL AS FROM WRITTEN DEFAMATION. *Id.*
9. SLANDEROUS COMMUNICATION IS NOT PRIVILEGED merely because uttered in the strictest confidence by one friend to another upon the most urgent solicitation. *Id.*

LIENS.

See MECHANICS' LIENS; VENDOR AND VENDER, 3-6.

MANDAMUS.

MANDAMUS MAY NOT BE MAINTAINED BY PRIVATE CITIZEN TO COMPEL RAILROAD COMPANY TO RELOCATE ITS ROAD. Unless the public interests have been injuriously affected, a private individual cannot insist by *mandamus* that a public right or duty be enforced; it is not sufficient that he has suffered private damage. Under the Iowa code, section 3377, the "order of *mandamus* is granted on the petition of any private party aggrieved." *Crane v. Chicago etc. R'y Co.*, 479.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **CONTRACTOR WHO HAS AGREED TO FURNISH FACILITIES FOR THE PURPOSE OF INSPECTING A TUNNEL ON WHICH HE IS AT WORK** does not thereby obligate himself to furnish transportation to the persons engaged in the work of inspecting; and if they, without his invitation, ride into the tunnel on a car used to bring out stone and other material, he is not answerable to them for injuries suffered by them from the negligence of one of his servants in not controlling the velocity of a descending car. *Morris v. Brown*, 751.
2. **IF CARS ARE NOT FITTED NOR FURNISHED FOR CARRYING MEN**, and there is nothing in their appearance or otherwise to invite a person to take passage therein, one who undertakes to ride therein, where there is no duty to carry him, and no invitation given him to ride, assumes all risks consequent on the condition of the car and track, or the omission or inattention of the servants in charge. *Id.*
3. **MASTER IS NOT ANSWERABLE FOR THE ACT OR NEGLECT OF HIS SERVANT**, when doing something which the master has not ordered done, if he has not authorized the servant to exercise a discretion in determining what to do. *Id.*
4. **WHERE SERVANT IS EMPLOYED TO MANAGE A DUMP-CAR** hauling stone and other material out of a tunnel, he has no authority to assent to a third person riding in such car, and his permitting such person to so ride is not equivalent to an invitation by his master, and though frequently repeated, if without the knowledge of the master, it cannot make the master answerable for acts or omissions in the management of the car from which the person so riding is killed or suffers substantial injuries. *Id.*
5. **MASTER AND SERVANT—LIABILITY OF MASTER FOR SERVANT'S NEGLIGENCE.** — IN ACTION TO RECOVER FOR INJURIES SUSTAINED BY PLAINTIFF from an explosion of powder and dynamite, accidentally caused by sparks thrown from his anvil while working in his blacksmith-shop, where the explosives had been stored, against his objection, by the defendant's foreman, to preserve them from the rain, the charges of the court, that if the act of the foreman in placing the explosives in the shop was so done with the *bona fide* purpose of preserving them, and in that way furthering the interest of his employer, then the latter would be liable, but otherwise if it was done by the foreman for a purpose of his own, fairly and correctly state the law. *Birmingham W. W. Co. v. Hubbard*, 35.
6. **ID.** — IN SUCH CASE, QUESTION WHETHER PLAINTIFF WAS GUILTY of contributory negligence in failing to ascertain if the explosives had been removed, before going into the shop to work with fire on the day of the accident, was properly submitted to the jury. *Id.*
7. **VERDICT NOT DISTURBED WHERE EVIDENCE IS IN CONFLICT.** — Where, in an action to recover damages for personal injuries caused by the employment of defective appliances, and negligence connected therewith, the evidence is conflicting, and the jury elect to accept that produced by the plaintiff, such election will not be questioned on appeal. *N. Y. & C. M. Co. v. Rogers*, 198.
8. **MASTER AND SERVANT—UNSAFE APPLIANCE—FINDING OF JURY CORRECT.** — Where, in an action to recover damages for personal injury sustained by a falling bucket in a shaft, and caused by unsafe appliances, and negligence connected therewith, it appears that the bucket in use

was hoisted and lowered by means of a rope, about eight feet of the lower end of which was wet and frozen, and with great difficulty fastened to the bail of the bucket; that at the time of the accident the rope was adjusted and fastened in the usual manner; that the foreman had previously given instructions to have the frozen part of the rope cut off, and apparatus substituted so as to make the fastening secure; that immediately after the accident this was done, and within thirty-six hours safe appliances were in use; that the evidence was conflicting as to whether a pin to fasten the rope to the bucket was furnished, or could have been used if furnished, and also as to whether specific instructions were given as to how the fastening should be made, — the jury were justified in finding the appliance unsafe, and that defendant had knowledge of its condition before the accident. *Id.*

9. CONTRIBUTORY NEGLIGENCE — PRESUMPTION. — Where, in an action for damages for personal injury, the question of contributory negligence is fairly submitted to the jury, it will be presumed that they considered it, and the judgment will not be disturbed, in the absence of error in receiving evidence, or in charging the jury. *Id.*
10. MASTER AND SERVANT — DECLARATIONS OF FOREMAN AS RES GESTÆ. — Where, in an action to recover damages for personal injury received from the use of unsafe appliances, it appears that the foreman on the ground, in charge of the work and acting directly in the line of his duty, made declarations as to the unsafe condition of the appliances immediately or within half an hour after the accident, such declarations are admissible as part of the *res gestæ*. *Id.*
11. WHILE RAILROAD COMPANY IN RELATION TO A BRAKEMAN IS NOT BOUND TO GUARANTEE THE ABSOLUTE FITNESS OF CONDUCTOR, yet in employing him company must exercise a degree of care commensurate with the responsibilities of the position, and in case peculiar fitness is required, or special qualifications demanded for the service to be performed, it is then the company's duty to institute inquiries relative to conductor's fitness to be intrusted with the service, unless it is assured by his previous like service of his competency for such position. *Evansville etc. R. R. Co. v. Guyton*, 458.
12. EMPLOYER'S LIABILITY TO CO-EMPLOYEE. — In case employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, employer will be liable to co-employee whose injury results proximately from lack of qualification of fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with employer to obtain notice. *Id.*
13. INSTRUCTIONS — INCOMPETENCE OF EMPLOYEE. — It is not error to refuse instruction which in effect limits evidence of specific acts of incompetency of employee to purpose of showing due care in selecting and retaining such employee, and also limits the same to purpose of bringing notice of incompetence to employer. *Id.*
14. NEGLIGENCE — LOW BRIDGES. — EMPLOYEE OF RAILROAD COMPANY HAS RIGHT TO ASSUME that it has constructed and maintained its roadway and bridges in such a manner and condition that, as a brakeman upon its trains, he can perform his duties with reasonable safety, and that if there is any such danger to be encountered in the service as a low bridge, he will be warned of it. *Louisville etc. R'y Co. v. Wright*, 432.

15. IT IS THE DUTY OF MASTER TO INFORM SERVANT OF INCREASED DANGER AND HAZARD created by him in the change of machinery or premises, unless the servant has notice, or the change and increased danger are so apparent that he ought to take notice. *Id.*
16. MASTER SHOULD INFORM SERVANT WHEN HIRING HIM WHERE THERE ARE DANGERS AND HAZARDS known to the former, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, unless the danger is so apparent that the servant will be bound to take notice of it. *Id.*
17. RAILROAD BRAKEMAN ASSUMES RISKS ORDINARILY AND PROPERLY INCIDENT TO SUCH SERVICE, but he does not assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice. *Id.*
18. IT IS NEGLIGENCE IN RAILROAD COMPANY TO CONSTRUCT AND MAINTAIN A BRIDGE so Low as not to afford sufficient space to allow brakeman to walk or stand without injury upon freight-cars in the discharge of his duty in the management of trains passing under it; and where the brakeman has no knowledge of the danger, and is injured by such bridge while acting in the line of his duty, the company is liable. *Id.*
19. MASTER AND SERVANT — WORK OUTSIDE OF EMPLOYMENT — NEGLIGENCE FOR JURY TO DETERMINE. — Where in an action for damages it appears that the plaintiff was sent by his master, an electric light company, to remove one of its electric lights and connect the wires with the circuit; that the work assigned was outside of his employment; that he was ignorant and inexperienced in such work, and was not instructed how to do it; that the usual time for turning on the electricity was 4:30 o'clock, P. M., on cloudy days, and 4:45 o'clock, P. M., on clear; that the day on which he was injured was clear; that he reached the lamp and commenced work at 4:15 o'clock, P. M., at which time, while at work on the wires, the current was turned on, and that he received the shock which caused the injury sued for, — the defendant is not entitled to a nonsuit, and the question of negligence or contributory negligence is for the jury. In such action an instruction that plaintiff had a right to believe and expect on that day that the current would not be turned on earlier than usual, that if the jury believe that on such day the current was turned on earlier than usual, and plaintiff was injured in consequence thereof, then defendant was negligent and plaintiff entitled to recover, is proper. *Colorado El. Co. v. Lubbers*, 255.
20. MASTER AND SERVANT. — LIABILITY OF MASTER must be determined by what took place before and at the time of the accident. What he did afterwards by way of precaution to avoid future accidents cannot be construed into an admission by him of previous neglect of duty. Therefore in an action for damages evidence that, after an accident causing the injury, the master put up warnings to employees not to engage in certain work after a certain hour, without first notifying his officers in charge, is inadmissible. *Id.*
21. FELLOW-SERVANTS, WHO ARE. — When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in doing his, then they are engaged in the same common business; and being subject to the control of the same master, they are fellow-servants, no matter how different the grades of service or compensation,

or how diverse or distinct their duties may be. *McMaster v. Ill. C. R. R. Co.*, 653.

22. FELLOW-SERVANTS. — TO ENTITLE SERVANT TO RECOVER FOR THE NEGLIGENCE OF HIS FELLOW-SERVANT, it must be shown that the latter was incompetent, and was selected without reasonable care and prudence, or was continued in service after the master knew of his unfitness. *Id.*
23. CONFLICT OF LAWS. — LAW OF THE PLACE WHERE AN INJURY WAS RECEIVED by one servant through the negligence of another servant of the same master must prevail in an action for such injury, though brought in another state, whose laws upon this subject are different. *Id.*
24. FELLOW-SERVANTS. — BRAKEMAN OF A FREIGHT TRAIN AND THE CONDUCTOR AND OTHER EMPLOYEES OF A PASSENGER TRAIN of the same railroad company are fellow-servants. *Id.*

MECHANICS' LIENS.

1. MECHANIC'S LIEN CANNOT BE ACQUIRED AGAINST PROPERTY OF AN INFANT, because an infant cannot make a valid contract, and a lien implies one. *Alvey v. Reed*, 418.
2. MECHANIC'S LIEN FOR CONSTRUCTING SIDEWALK IN FRONT OF A LOT is not enforceable against such lot under section 3120, code of Iowa. *Coe-nen v. Staub*, 470.

See INFANCY, 1.

MINES AND MINING.

1. MINES AND MINING. — NOTICE OF DISCOVERY put up by the discoverer of a mineral lode at his point of discovery, specifying in addition to the statutory requirements the extent of territory claimed along the vein on both sides of the point of discovery, is an appropriation of so much territory for the period of sixty days in which to sink a discovery shaft, although the boundaries thereof are not marked, and such notice renders void an overlapping claim on the same vein and territory made within the period mentioned, and based upon a junior discovery. *Omar v. Soper*, 246.
2. MINES AND MINING. — TITLE TO MINERAL LODGE in the actual possession of parties claiming to own it, and engaged in developing it, cannot be initiated by others by a survey, and recording a location certificate. *Id.*
3. MINES AND MINING. — SURVEYING, STAKING, AND RECORDING a mineral location certificate of a lode claim previously located, which overlaps the territory of what is claimed to be an abandoned lode claim, is not a re-location of the latter claim within the meaning of Colorado General Statutes, page 725, section 2411. *Id.*
4. MINES AND MINING. — WHERE LODGE CONSISTS of a single vein, the portion thereof appropriated by the first discoverer is wholly withdrawn from interference or claim by another until some default is made, and the law relating to cross-lobes approaching from different directions and uniting at some point, and authorizing the subsequent locator to cross or enter the territory of the claimant of the other lode, has no relation to single veins. *Id.*
5. MINES AND MINING. — WHERE ONE OF TWO DISCOVERERS of a mineral lode acquired the interest of the other therein, and then erased the name of the latter from the notice of discovery, changed the date thereof from time of discovery to time of acquiring the whole interest, and continued

in possession developing the lode, and claiming in good faith to be the owner, no abandonment took place, nor did he lose or forfeit any rights acquired by the previous discovery. *Id.*

6. MINES AND MINING. — FAILURE TO RECORD MINERAL LOCATION CERTIFICATE, within three months from the date of discovery of the lode, will not inure to the benefit of the owners of an overlapping claim based on a junior discovery, when such owners have neither made nor attempted to make a relocation. *Id.*
7. MINES AND MINING. — WHERE CLAIM SET UP TO TITLE to mineral lode is void in its inception, plaintiff has no standing to question the validity of defendant's title. *Id.*
8. MINES AND MINING. — MINING TITLES cannot be questioned collaterally. *Id.*

MORTGAGES.

1. CHATTEL MORTGAGE IS NOT VOID BECAUSE MORTGAGOR IS TO RECEIVE SOME BENEFIT therefrom, if the provisions for such benefit are made in good faith, and not for the purpose of hindering, delaying, or defrauding creditors. *Whitson v. Griffie*, 546.
2. CHATTEL MORTGAGE IS NOT TO BE CONSIDERED VOID AS TO MORTGAGOR'S CREDITORS UNLESS GOOD FAITH OF TRANSACTION IS ESTABLISHED BY STRICT PROOF, from the mere fact that the mortgager is a step-daughter of the mortgagee, although that is a circumstance to be taken into consideration by the jury. *Id.*
3. CHATTEL MORTGAGE ON STOCK OF GOODS IS NOT VOID, AS MATTER OF LAW, AS TO CREDITORS OF MORTGAGOR, but the question of good faith should be submitted to the jury, where the mortgage contains a provision that the mortgagor shall remain in possession of the property, and sell the same in the course of trade, account for the proceeds, and receive out of the same the expenses of operating the business, and the means of subsistence of his family. *Id.*
4. MORTGAGE. — THE TERM "ASSIGNMENT" does not, like the term "deed" or "specialty," signify an instrument under seal. *Barrett v. Hinckley*, 331.
5. MORTGAGE — INSTRUMENT UNDER SEAL. — A WRITTEN ASSIGNMENT founded upon a valuable consideration is as available as an instrument under seal to pass assignee the equitable title to land; but an instrument *inter partes*, in order to pass the legal title to real property, must be under seal. *Id.*
6. TITLE OF MORTGAGEE — CONVEYANCE OF LAND WITHOUT ASSIGNMENT OF THE DEBT. — The doctrine would seem to be fundamental that if one *sui juris* having the legal title to land intentionally delivers to another a deed therefor containing apt words of conveyance, the title at law at least will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter holds the legal title as trustee for the holder of the mortgage debt, though the interest which passes is of no appreciable value to the grantee. *Id.*
7. TITLE OF MORTGAGEE IN FEE IS IN NATURE OF BASE OR DETERMINABLE FEE. The term of its existence is measured by the mortgage debt; when that is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. *Id.*

8. NOTICE OF FIRST MORTGAGE IS NOT IMPUTED TO A SECOND MORTGAGEE because his agent, who negotiated and took the second mortgage, acted in a like capacity in respect to the first mortgage, unless it is shown that the agent, when taking the second mortgage, had the first mortgage present in his mind, and did not proceed in the belief that it had ceased to be an existing and valid lien on the mortgaged premises. *Id.*
9. ONE IS ENTITLED TO BE REGARDED AS A MORTGAGEE FOR A VALUABLE CONSIDERATION who surrenders therefor a prior mortgage with the accrued interest thereon. *Constant v. Rochester University*, 769.
10. ADVERSE INTEREST TO MORTGAGOR CANNOT PROPERLY BE LITIGATED IN FORECLOSURE SUIT; but if it is put in issue, tried, and determined, the judgment is not void on a collateral attack. *Johnston v. San Francisco Savings Union*, 129.
11. ORAL TESTIMONY TO PROVE ABSOLUTE DEED WAS IN REALITY MORTGAGE is not admissible in an action at law in New Jersey. In the judicial system of that state, the jurisdiction to convert an absolute deed into a mortgage by parol evidence is exclusively in the equity courts. *Lindley v. O'Reilly*, 802.
12. MORTGAGE IS, IN NEW JERSEY, MERE SECURITY FOR DEBT or liability for which it is given, and payment or satisfaction of the debt or liability discharges the mortgage, and reverts the mortgaged premises in the mortgagor without a reconveyance. *Id.*
13. MORTGAGES. — BETWEEN PARTIES, MORTGAGE TRANSFERS LEGAL TITLE, defeasible on performance of the conditions and the right of immediate possession, unless by its terms possession is reserved in the mortgagor for an unexpired term. As to the mortgagee, the mortgagor has only an equity, but as to all persons except the mortgagee and those claiming in his right, the mortgagor is the owner of the fee, and has title under which he may maintain ejectment against strangers who have no connection with the title of the mortgagee, and the defendant in ejectment will not be allowed to set up such outstanding title to defeat the action. *Cotton v. Carlisle*, 29.
14. UNDER PROVISION OF ALABAMA CODE OF 1886, SECTION 2892, that "when any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities," a purchaser of the equity of redemption in mortgaged lands, at execution sale against the mortgagor, acquires a title on which he may maintain ejectment to recover possession from the mortgagor, who cannot defeat the action by setting up the outstanding title of the mortgagee. *Id.*
15. MORTGAGEE IS CHARGED WITH NOTICE OF FACT AFFECTING TITLE TO MORTGAGED PROPERTY, when he has readily accessible means of acquiring knowledge thereof which he might have ascertained by inquiry. *Montgomery v. Keppel*, 125.
16. PRIOR MORTGAGEE IS CHARGED WITH NOTICE OF TERMS UPON WHICH PURCHASE OF MORTGAGED PROPERTY IS MADE, where, pending his negotiation with the mortgagor, he acquires knowledge that the title to the property is in a third person, with whom the mortgagor was negotiating for the purchase, which was afterwards consummated by the delivery of a deed to the mortgagor, and the execution by him of a mortgage back to the grantor to secure the purchase-money. *Id.*
17. ONE WHO COMES INTO EQUITY FOR RELIEF AGAINST CLOUD CAST BY FORECLOSURE PROCEEDINGS UPON HIS INTEREST, which escaped being bound

by the decree in foreclosure through a slip in the proceedings, will be required, as a condition for relief, to pay his proportion of the mortgage debt, less the amount of the rents and profits of his interest received by the mortgagee, who purchased at the foreclosure sale and went into possession thereunder. *Johnston v. San Francisco Savings Union*, 129.

See EJECTMENT; HOMESTEADS, 5.

MUNICIPAL BONDS.

See MUNICIPAL CORPORATIONS, 3-6.

MUNICIPAL CORPORATIONS.

1. AN INTEREST IN THE STREETS OF THE CITY OF NEW YORK MAY BE GRANTED IN PERPETUITY, and irrevocably, by the city authorities. *People v. O'Brien*, 684.
2. SPECIAL MEETING OF A BOARD OF SUPERVISORS WILL BE PRESUMED TO HAVE BEEN LEGALLY CALLED. *Tierney v. Brown*, 679.
3. NEGOTIABLE COUNTY BONDS ARE VALID IN HANDS OF BONA FIDE PURCHASERS FOR VALUE, notwithstanding there were such irregularities in calling and holding the elections authorizing their issue that if the question of their validity had been raised in the proper manner and at the proper time they would have been held invalid. *State v. Commissioners*, 569.
4. CONTRACT BY CITY, AND ADDITIONAL BONDS ISSUED AND DEPOSITED BY IT THEREUNDER, ARE BOTH VOID, where a city in Kansas refunds a portion of its outstanding bonded indebtedness at sixty cents on the dollar, under chapter 89 of the laws of 1877, which permits it to refund such indebtedness at that rate only, and at the same time, and as a part of the same transaction, it enters into a contract with the holders of the original bonded indebtedness to issue still other and additional bonds on the same bonded indebtedness, and to deposit such additional bonds with a third party to be afterwards delivered to the holders of the original bonded indebtedness, and to become valid and binding instruments upon certain contingencies; nor are they valid under chapter 50 of the laws of 1879, because the bonds were not issued in conformity with that act; nor valid under chapter 67 of the laws of 1873, because the city council never took action as provided under such act, and the bonds were not issued thereunder. *Brown v. Atchison*, 515.
5. PARTY WHO RECEIVES BENEFIT UNDER CONTRACT ENTERED INTO IN GOOD FAITH BETWEEN CORPORATION, PUBLIC OR PRIVATE, AND INDIVIDUAL, but which contract is void in whole or in part because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which it was entered into, but which is not immoral, inequitable, or unjust, and which is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance, over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, will be required to do equity toward the other party, by either rescinding the contract and placing him *in statu quo*, or by accounting to him for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit. *Id.*

- 6. MUNICIPAL CORPORATION WILL BE REQUIRED TO ACCOUNT TO HOLDERS OF ORIGINAL BONDED INDEBTEDNESS FOR ALL BENEFITS RECEIVED BY IT UNDER CONTRACT** to re-fund the bonds, which is void because of a want of power on the part of the corporation to make it in the form in which it was made, where the contract is not inequitable or unjust, or otherwise illegal, and has been performed by such holders, and under which the corporation has received benefits which it might lawfully have received, and for which it has rendered no equivalent. *Id.*

See CORPORATIONS; FRANCHISES; NUISANCE, 5, 6.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

- 1. NEGLIGENCE IS THE OMISSION OF CARE OR CAUTION IN WHAT WE DO;** but where there is no duty to be cautious and vigilant, there can be no negligence in the legal sense of the term. *Morris v. Brown*, 751.
- 2. QUESTION OF CONTRIBUTORY NEGLIGENCE IS TO BE DETERMINED BY JURY,** and not by the court, when the testimony leaves the question in doubt. *City R. R. Co. v. Lee*, 798.
- 3. OPINION AS EVIDENCE ON QUESTION OF CONTRIBUTORY NEGLIGENCE.** — In an action against a railroad company for causing the death of an employee who was on a hand-car at the time that it came in collision with an extra train of defendant's, causing the accident, the defendant may ask a witness, who was a co-employee and on the hand-car at the time, and who had testified to all the facts relating to the matter in dispute, whether deceased had sufficient time to jump from the hand-car before the collision happened. *Quinn v. New York etc. R. R. Co.*, 284.
- 4. EVIDENCE — INCONSISTENT STATEMENTS OR CONDUCT OF WITNESS.** — In an action against a railroad company for causing the death of an employee, after the superintendent of the company has testified that the rules and regulations in force at the time of the accident were the best that could be devised for such exigencies, he may be asked on cross-examination if he has not issued new rules and orders since the accident, to show inconsistency in his testimony. *Id.*
- 5. NEGLIGENCE OF THIRD PARTY WILL NOT BE IMPUTED TO PLAINTIFF** seeking damages for injury occasioned by defendant's negligence, where plaintiff was injured without his personal fault while riding in a private conveyance under the sole control and charge of the owner and driver, who was a fit person to manage horses. *Brannen v. Kokomo etc. Co.*, 411.
- 6. WHERE THE ISSUE IS NEGLIGENCE, IT MUST BE ALLEGED AND MADE TO APPEAR FROM THE EVIDENCE** that plaintiff was not guilty of negligence contributing to the injury, and if from the whole evidence it cannot be determined whether or not he was free from such negligence, he cannot recover, unless the defendant be chargeable with willful wrong. *Id.*
- 7. WILLFUL WRONG WHICH WILL JUSTIFY RECOVERY, NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE,** exists where there is an express intent to commit the injury. It may also exist where there is a constructive or implied intent, as where the act which produced the injury is done under circumstances such as evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of, or where it is committed under such circumstances that the natural and proba-

ble consequences of the act would be to produce the injury; otherwise there is no such willful wrong. *Id.*

8. **NEGLIGENCE — EVIDENCE OF CHARACTER AND EXTENT OF INJURY IN ACTION FOR DAMAGES.** — In such action, for the purpose of showing the character of his injury and the nature and intensity of his suffering, plaintiff may show, after stating how accident occurred and the manner and extent of his injury, that after he had extricated himself from the collision causing the injury, he had proceeded in his disabled condition about one quarter of a mile along the track to flag a train, and prevent its running into the wreck; that he had so done believing it to be his duty as brakeman; that in doing such act he had suffered great pain, and after flagging the train, became unconscious, and remained so till the next day. *Evanville etc. R. R. Co. v. Guyton*, 458.

See COMMON CARRIERS; ESTOPPEL, 2; MASTER AND SERVANT; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. **MAKER OF PROMISSORY NOTE WHO SIGNS IT WITHOUT READING, OR HAVING IT READ to him, no fraud, deceit, or misrepresentation being practiced by which he was induced to do so, cannot defeat an action on it by an assignee, under the plea of *non est factum*, because he did not know it was made payable to a partnership and not to an individual partner with whom he was dealing, and against whom he claimed a set-off.** *Cannon v. Lindsey*, 38.
2. **CONSIDERATION OF NOTE IS NOT ILLEGAL** when it is given by an agent of a county treasurer, whom the latter had, without authority of law, appointed to conduct the office, to secure the repayment of moneys previously misappropriated by such agent. *Board of Supervisors v. Alford*, 637.
3. **BILL OF EXCHANGE OR CHECK SPECIFYING NO TIME OF PAYMENT** is payable on demand. *Parker v. Reddick*, 646.
4. **PRESENTMENT FOR PAYMENT OF A BILL OR CHECK PAYABLE ON DEMAND** must be within a reasonable time. *Id.*
5. **WHAT IS REASONABLE TIME WITHIN WHICH TO PRESENT BILL OR CHECK FOR PAYMENT** is a question of law to be determined by the court when the facts are ascertained. Delay in such presentment cannot be reasonable if it is more than is fairly required in the ordinary course of business, without special inconvenience to the holder, or by the special circumstances of the case. *Id.*
6. **PRESENTMENT FOR PAYMENT WHEN THE DRAWEE OF A BILL LIVES IN A DIFFERENT PLACE FROM THAT IN WHICH IT IS DRAWN, and the instrument must be sent by mail for presentment, must be by mailing it the next day after it was received by the holder.** *Id.*
7. **PAPER PAYABLE ON DEMAND MAY BE PUT IN CIRCULATION, BUT ITS ULTIMATE PRESENTMENT FOR PAYMENT cannot be delayed beyond a reasonable time by successive transfers, any more than it can by being locked up or held an unreasonable time by the first or any successive holder.** *Id.*
8. **DELAY IN PRESENTING A CHECK FOR PAYMENT, THOUGH SUFFICIENT TO RELEASE THE INDORSER THEREOF, WILL NOT RELIEVE THE DRAWER from liability, unless he shows that he was injured thereby.** *Id.*
9. **NEGOTIABLE INSTRUMENTS. — BONA FIDE PURCHASER OF NEGOTIABLE BILL, BOND, OR NOTE, ACQUIRES GOOD TITLE THERETO, although he buys from a thief, if he pays value for it without notice of the infirmity of his vendor's title.** *East Birmingham L. Co. v. Dennis*, 73.

10. **CERTIFICATE OF CORPORATE SHARES OF STOCK, IN ORDINARY FORM, IS NOT NEGOTIABLE PAPER**, notwithstanding a custom or usage among stockbrokers to the contrary; and an innocent purchaser for value of such certificate, although indorsed in blank by the owner, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner. *Id.*
11. **VENDOR OF NEGOTIABLE BONDS OR NOTES WHO ASSIGNS THEM "WITHOUT RECOURSE" IS LIABLE ON IMPLIED WARRANTY**, in the absence of express representation, for any deficiency between the amount apparently due upon the face of the instrument and the amount legally collectible upon it, although the deficiency arises from a successful interposition of the defense of usury whereby the collection of interest on the note is defeated. *Drennan v. Bunn*, 354.
12. **VENDOR OF NEGOTIABLE NOTE IS CONCLUDED BY JUDGMENT OBTAINED IN SUIT OF WHICH HE HAD DUE NOTICE**, between his vendee and the payor of the instrument, and in which suit the defense of usury was set up, although such vendor was not expressly requested to take charge of the suit, and the note was sold "without recourse." *Id.*

See AGENCY, 3; PLEDGE, 5; USURY.

NEW TRIAL.

NEW TRIAL MAY BE GRANTED WHERE VERDICT IS AGAINST INSTRUCTIONS OF COURT. Instructions, whether right or wrong, constitute the law of the case, and it is the duty of the jury to follow them. *Crane v. Chicago etc. Ry Co.*, 479.

NOTICE.

POSSESSION AS NOTICE OF EQUITABLE TITLE. — If grantor remains in possession, this is not sufficient, as against his recorded deed, to put intending purchasers on inquiry to ascertain whether the deed was fraudulent, or whether the grantor retains any interest in the land. *Hafter v. Strange*, 659.

See AGENCY; PLEDGE.

NUISANCE.

1. **CONTINUING NUISANCE — DAMAGES — AVERMENT OF REQUEST TO REMOVE SAME.** — Where a party comes into possession of land as grantee or lessee with an existing nuisance upon such land, and he merely permits the nuisance to remain or continue, he cannot be held liable in action for damages until he has been first notified or requested to remove the nuisance. *Groff v. Ankenbrandt*, 342.
2. **NUISANCE.** — It is necessary to aver that the natural flow of water has been obstructed, in action for obstructing water and overflowing plaintiff's land, for otherwise the complaint is susceptible of the construction that the waters whose flow was obstructed were such as the owner of the servient tenement was under no obligation to receive. *Id.*
2. **MEASURE OF DAMAGES.** — Where the nuisance is not necessarily a permanent one, but may be abated at any time by the defendants, the measure of damages is a depreciation of rental value while the nuisance existed, in a case where the alleged nuisance was the rendering of plaintiff's dwelling-house uninhabitable by reason of foul and unhealthy odors emitted from defendants' stock-yards. *Shively v. Cedar R. etc. Co.*, 471.

4. IT IS NO DEFENSE THAT NUISANCE WAS NECESSARY TO THE OPERATION OF RAILROAD BY DEFENDANTS, in a case where the alleged injury was to plaintiff's dwelling-house, caused by the proximity to stock-yards, and the odors complained of were unwholesome, threatening the health of the inmates of the house, it not being shown that they were unavoidable, or that the yards might not have been located at another place on the road with equal convenience to the road and its patrons. *Id.*
5. NUISANCE, POWER OF MUNICIPAL CORPORATION TO DECLARE WHAT IS A.— A municipal corporation cannot make that a nuisance which is not such in fact; therefore an ordinance which declares that "all hog-pens, or lots now used as such, are hereby declared a nuisance, and shall be abated," is too broad and sweeping in its provisions, and is invalid. *Ex parte O'Leary*, 640.
6. CORPORATIONS.— FAILURE ON PART OF MUNICIPAL CORPORATION TO PROVIDE MEANS for abating a nuisance wholly on private property, and caused by the act of the owner alone, or the omission of its officers to abate the nuisance when the means are provided, gives no cause of action against the corporation to one who is injured by such neglect of duty. *James v. Trustees*, 589.
7. PRIVATE CITIZEN CAN ONLY ABATE PUBLIC NUISANCE WHEN IT BECOMES OBSTRUCTION to the exercise of his private right. But when, by interfering with and causing a deprivation of the enjoyment of his private right, it becomes as to him a private nuisance, he may abate it. *Brown v. De Groff*, 794.

OFFICE AND OFFICERS.

POWERS OF FISH INSPECTOR JUDICIAL.—The power of a fish inspector to determine the quality and healthfulness of fish offered for sale in the markets of a city, and if found to be unwholesome or unfit to be eaten, to condemn and destroy it, is judicial in its nature, and he is not liable to any one in an action for damages, however erroneously, ignorantly, negligently, or carelessly he may act in the exercise of such power, provided he acts within his jurisdiction. *Fath v. Koepfel*, 867.

See BONDS; JUSTICES OF THE PEACE.

PARENT AND CHILD.

ADOPTED CHILD IS ENTITLED TO SUCCEED BY INHERITANCE TO ESTATE OF ADOPTING PARENT, under sections 227, 228, and 1386 of the Civil Code of California, which provide that the adopted child shall be "regarded and treated in all respects as the child of the person adopting," and shall "have all the rights and be subject to all the duties of the legal relation of parent and child." *Newman's Estate*, 146.

See FRAUDULENT CONVEYANCES.

PARTNERSHIP.

1. PARTNERSHIP.— ONE MEMBER OF PARTNERSHIP, WHETHER THEN EXISTING OR DISSOLVED, CANNOT APPROPRIATE the firm assets by transferring them in satisfaction of his individual debt without the authority or consent of his copartners. Such transaction is a fraud on the latter, and does not divest the title of the partnership in favor of the separate creditor, whether he knew it to be partnership property or not. *Cannon v. Lindsey*, 38.

2. **SET-OFF.** — IN ACTION ON PARTNERSHIP DEMAND, WHETHER BROUGHT IN NAME OF PARTNERSHIP or their assignee, the defendant cannot set off against the partnership demand an individual debt due him from one of the partners. *Id.*
3. **FUNDS MISAPPROPRIATED BY ONE PARTNER TO THE PAYMENT OF HIS INDIVIDUAL DEBTS** may be recovered back, if needed for firm purposes, and if paid to a creditor who had knowledge of the misappropriation at the time he received payment, and the misappropriation was without the assent, express or implied, of the other members of the firm. *Davies v. Atkinson*, 373.
4. **FUNDS OF A PARTNERSHIP MISAPPROPRIATED TO THE PAYMENT OF THE DEBTS OF A MEMBER OF THE FIRM, WITH THE ASSENT OF THE OTHER MEMBERS,** cannot be recovered, unless the partnership is insolvent, and the moneys thus misappropriated are required to discharge its obligations. *Id.*
5. **LACHES.** — It is unreasonable to delay nearly two years after knowledge of the misappropriation by a partner of the firm's money to the payment of his debts before bringing action for its recovery. *Id.*
6. **EVIDENCE.** — IN ACTION TO RECOVER MONEY ON THE GROUND THAT IT WAS MISAPPROPRIATED BY A PARTNER TO THE PAYMENT OF HIS INDIVIDUAL DEBT, the plaintiff, before he can succeed, must prove that the moneys withdrawn by such partner were in excess of the sums which he was entitled to draw from the partnership on his individual account. *Id.*
7. **IN CASE OF AN EXECUTION AGAINST ONE ONLY OF SEVERAL PARTNERS,** the proper mode is to levy upon and sell such partner's interest in the whole of the partnership effects, and not in specific articles of the partnership property. *Gerard v. Bates*, 350.
8. **PARTNER IS NECESSARY PARTY TO BILL FOR ACCOUNTING,** where by sale on execution only part of his interest in the partnership is disposed of, and the purchaser seeks for a settlement and adjustment by such bill of the partnership affairs. *Id.*
9. **SALE OF PARTNERSHIP PROPERTY ON EXECUTION — INJUNCTION.** — Interest of one partner in goods or property of the firm may be seized and sold on execution; but specific articles of partnership property cannot be levied upon and sold; and if the officer seeks to sell such specific articles, the other partners may enjoin the sale or delivery of the articles. *Williams v. Lewis*, 403.
10. **ESTOPPEL.** — DECLARATIONS OF ONE PARTNER THAT PROPERTY LEVIED ON AND SOLD UNDER EXECUTION is the individual property of another partner, for the satisfaction of whose debt it is taken, when made without the knowledge of the copartners, do not estop the firm from asserting that it was partnership property; and notice to one partner that property was about to be so sold, and his acquiescence in the sale, do not estop the partnership from asserting its claim thereto. *Id.*
11. **INJUNCTION — TENDER.** — SALE OF PARTNERSHIP PROPERTY UNDER EXECUTION MAY BE SET ASIDE, and purchaser of such property may be enjoined from its removal where it has been wrongfully sold to and purchased by him at such sale; nor is it necessary in such suit to tender to the purchaser the price paid by him for the property, and it makes no difference that a remedy at law by way of replevin for the property might be brought. *Id.*

PERJURY.

See CRIMINAL LAW.

PHYSICIANS.

1. ACTION IS ONE SOUNDING IN TORT AND NOT UPON CONTRACT, when the complaint alleges as the *gravamen* of the action that the defendant disregarded his duty in the premises by negligently, wrongfully, and carelessly failing to make a proper diagnosis of the plaintiff's disease, and to prescribe proper remedies therefor, although it also alleges an implied contract of the defendant to treat the plaintiff in a skillful and proper manner. *Nelson v. Harrington*, 900.
2. PHYSICIAN OR SURGEON IS BOUND TO EXERCISE SUCH REASONABLE CARE AND SKILL as is usually possessed and exercised by physicians and surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practise, having due regard to the advanced state of medical or surgical science at the time, where he holds himself out and accepts employment as such physician or surgeon, whether he has been duly licensed or not. *Id.*
3. TO CONSTITUTE SYSTEM OF PRACTISE A SCHOOL OF MEDICINE, it must have rules and principles of practice in respect to diagnosis and remedies, which each member is supposed to observe in any given case. *Id.*
4. CLAIRVOYANT PHYSICIANS ARE BOUND TO TREAT PATIENTS WITH ORDINARY SKILL and knowledge of physicians in good standing practicing in that vicinity, although, not having any fixed principles or formulated rules for the treatment of diseases, they cannot be regarded as constituting a school of medicine. *Id.*
5. CLAIRVOYANT PHYSICIAN SUED FOR MALPRACTICE CANNOT BE HEARD TO CHARGE WITH NEGLIGENCE the patient's father, because the latter, with full knowledge of the defendant's methods of diagnosis and prescription, employed him to treat his son. *Id.*
6. DEPOSITION, WHEN NOT ADMISSIBLE AS EVIDENCE IN CHIEF. — In an action against a physician for malpractice, a deposition of the plaintiff's father, taken in a suit brought by the latter against the defendant for loss of his son's services by the same malpractice, is not admissible as evidence in chief against the plaintiff. *Id.*

See WITNESSES, 2.

PLEADING AND PRACTICE.

1. WHERE EXTRA-PROFESSIONAL STATEMENTS ARE MADE BY COUNSEL IN ADDRESSING JURY, there is no error if matter is set right by court in such manner that no harm could have resulted. *Evansville etc. R. R. Co. v. Guyton*, 458.
2. REMARKS OF COUNSEL PROMPTLY DISAPPROVED BY COURT, AND COUNTERACTED by the charge of the court to the jury, are not ground for reversal. *Nelson v. Harrington*, 900. •
3. PARTY'S PLEADING IS TO BE TAKEN MOST STRONGLY AGAINST HIMSELF, and most favorably to his adversary. *Groff v. Ankenbrandt*, 342.
4. PLEADING AND PRACTICE. — DUPLICITY OR REDUNDANCY is not ground of demurrer, except in the case of dilatory pleas. *Cannon v. Lindsey*, 38.
5. DEMURRER. — WHERE REPLICATION IS FILED TO A PLEA, and the replication is demurred to, the demurrer will be carried back and sustained to the plea itself, if that is defective. *Shalucky v. Field*, 617.
6. PLEADING AND PRACTICE. — PARTY SETTING UP AFFIRMATIVE DEFENSE has the burden of proof to show it true. *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 226.

7. **PLEADING AND PRACTICE. — PARTY MAY DENY** wholly the wrong with which he is charged, putting the party alleging it to the proof, relying upon his inability to make such proof of any part of the whole wrong. But the fact that the complaining party does succeed in proving a part only of all the wrongs alleged is no evidence that defendant is surprised in either fact or law. *Id.*
8. **ANSWER, AVERMENTS OF, WHEN DEEMED DENIED. —** Allegations of agency and authority pleaded as new matter in a reply are to be deemed to be controverted by defendant without the filing of any pleading or affidavit denying the same, under section 86 of the Kansas code, which does not provide for any pleading to the reply, except a demurrer, and section 128, which provides that "the allegation of new matter in the reply shall be deemed to be controverted by the adverse party, as upon direct denial or avoidance, as the case may require," notwithstanding section 108, which provides that "in all actions, allegations of . . . any appointment or authority shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney." *Continental Ins. Co. v. Pearce*, 557.
9. **NONSUIT IMPROPER WHEN. —** Where the liability of a defendant corporation, if any, must arise out of its failure to perform duties imposed by its charter, or out of the negligent manner in which it performed those duties, and the facts and the inferences are in dispute, a nonsuit should not be granted. *Keator L. Co. v. St. Croix B. Co.*, 837.
10. **BILL OF EXCEPTIONS** is in record, notwithstanding the rendition of the judgment and the approval of an appeal bond intervened between the overruling of a motion for a new trial and the giving of time within which to file such bill. *Louisville etc. Co. v. Wright*, 432.
11. **PRACTICE. — TO BRING INSTRUCTIONS INTO THE RECORD** without a bill of exceptions, the Indiana statute imperatively requires that they shall be signed by the judge and filed. That they must be thus filed is a rule of practice established by the legislature, which the supreme court cannot change: *R. S. 1881, sec. 533, clause 6. Id.*
12. **INSTRUCTIONS. —** It is unnecessary to embody all the law of the case in one instruction; and where a rule of law applicable to the case is given in one instruction, it is not necessary to repeat it in another; if an instruction is not erroneous as to the law, and is not full enough, the party who thinks it faulty should submit additional instructions. *Id.*
13. **INSTRUCTIONS. —** All instructions given must be considered together, and if, so considered, they correctly and intelligibly state the law, and are not confusing to the jury, the judgment will not be reversed because of inaccuracy of some particular instruction. *Id.*
14. **ALTHOUGH INSTRUCTION IS ERRONEOUS**, yet if it appear from the finding of the jury that it was a harmless error, it can furnish no ground of complaint. *Id.*
15. **IT IS NO ERROR TO REFUSE INSTRUCTION** when there is no evidence to which the same is applicable. *Evansville etc. R. R. Co. v. Guyton*, 458.
16. **INSTRUCTIONS SHOULD STATE LEGAL PRINCIPLES APPLICABLE TO THE FACTS OF THE CASE, AND NOT MERE GENERAL RULES OF POLICY** which may or may not be wise and proper in the conduct of a particular business. *Id.*
17. **IF INSTRUCTIONS, TAKEN AS A WHOLE, ARE CORRECT**, it constitutes no ground for reversal that a portion of them taken separately are erroneous. *Shively v. Cedar R. etc. Co.*, 471.

18. **THOUGH CHARGE ABSTRACTLY CONSIDERED BE NOT STRICTLY CORRECT**, yet if, taken in connection with the circumstances of the case and other instructions given, it cannot have done any injury to the party, or misled the jury, it will not be ground for reversal. *Hemmingway v. Chicago etc. Co.*, 823.
 19. **CONFESSIONS. — INSTRUCTION TO JURY**, asked by defendant's counsel, to the effect that they "may consider the admissions made by defendant, and give them such weight as they may deem them entitled to under all the circumstances of the case, and if the jury believe from the evidence that the confessions of defendant were brought about by fear, and were not true, they will disregard them," should not be refused. *Ellis v. State*, 634.
 20. **ERROR IN ADMITTING EVIDENCE MAY BE CURED BY INSTRUCTION** which withdraws from the jury the consideration of the evidence so admitted. *Sullens v. Chicago etc. R'y Co.*, 501.
 21. **ERROR IN RECEIVING IMMATERIAL EVIDENCE IS MATERIAL**, when the court after objection, receives it as material, and may have given it weight in disposing of the case. *Blodgett v. Abbot*, 873.
 22. **OPINION OF TRIAL COURT IS NOT THE "FINDINGS."** *Johnston v. San Francisco Savings Union*, 129.
 23. **APPEAL FROM JUDGMENT WILL BE DISMISSED IF NOT TAKEN WITHIN ONE YEAR** after the entry of judgment, as provided for by section 939 of the Code of Civil Procedure of California. *Heilbron v. Fowler Switch Canal Company*, 183.
 24. **PRACTICE. — UPON APPEAL FROM ORDER SETTING ASIDE DEFAULT**, supreme court will not consider complaint that the court below in opening default permitted a demurrer to be filed to the petition, when such matter did not pertain to the order, and the remedy was by moving to strike the demurrer from the files and the court below has not determined the right to demur. *Jeans v. Hennessy*, 486.
 25. **WHEN OBJECTION TO OMISSION OF PARTIES MAY BE TAKEN ON APPEAL. —** Where the parties omitted are mere formal parties, and not indispensable to a decision of the case upon its merits, it will be too late to make objection at the hearing; but where the rights of the parties not before the court are intimately connected with the matter in dispute, so that a final decree cannot be made without materially affecting their interests, the objection may be taken at the hearing, or on appeal, or on error. *Gerard v. Bates*, 350.
 26. **PRACTICE TO REMAND CAUSE GENERALLY** is proper if decree is reversed for variance between the allegations of the bill and the proofs, or for any reason not going to the merits of the cause; otherwise, where upon the merits there can be no recovery. *Price v. Dime Savings Bank*, 367.
- See ATTACHMENT AND GARNISHMENT; CRIMINAL LAW; INTERPLEADER; WRITS OF ERROR.**

PLEDGE.

1. **SALE OF PLEDGED PROPERTY — NOTICE. —** At common law the pledgee had no right to sell the property pledged without judicial process, unless he gave the pledgor reasonable notice to redeem, and the pledgor was also entitled to notice of the pledgee's intention to sell, and of the time and place of sale. *McDowell v. Chicago Steel Works*, 381.
2. **NOTICE OF SALE OF PLEDGED PROPERTY IS NOT NECESSARY** where payment is demanded of the pledgor, and the instrument in writing, by which the

security pledged is assigned and transferred to the pledgee, specially authorizes the latter to sell "at public or private sale at his discretion," upon default being made, or upon the expiration of a certain number of days after default; and this rule applies to stock so pledged as collateral. *Id.*

3. **LACHES — ESTOPPEL.** — Where party allows a sale of pledged stock to stand for six years after it was made, this constitutes such serious laches as to preclude a recovery; and where in addition he received from the company the difference between the real value of the stock and what it sold for, and sued in trover after demand and failure to obtain it for his stock note as having been satisfied by sale of the stock, he is estopped from claiming the sale to be void. *Id.*
4. **DISCHARGE OF PROPERTY HELD AS COLLATERAL.** — When a third person pledges his property as security for the payment of a debt or obligation of another, such property will stand in the position of a surety of the debtor, and any change in the contract of suretyship which will discharge a surety will release and discharge the property so held as collateral. This rule also applies to mortgages made by one person to secure the debt of another. *Price v. Dime Sav. Bank*, 367.
5. **SURRENDER AND CANCELLATION OF OLD NOTES SECURED BY COLLATERAL IS SUFFICIENT CONSIDERATION FOR NEW NOTES**, and the holder by such surrender and cancellation puts it out of his power to sue on the indebtedness or enforce its collection until the maturity of the new notes. *Id.*

PROCESS.

1. **ACTION FOR DIVORCE IS PROCEEDING IN REM, SO FAR AS IT AFFECTS STATUS OF PARTIES** and the custody of their minor children, and a service of summons by publication on a non-resident defendant is good. *Newman's Estate*, 146.
2. **AMENDED AFFIDAVITS OF SERVICE OF SUMMONS BY PUBLICATION MAY BE RECEIVED BY COURT** after judgment has been rendered in an action for divorce, and before the roll is made up. *Id.*

PUBLIC LANDS.

1. **PUBLIC LANDS — DEED TO TOWN SITE BY PROBATE JUDGE.** — Execution and delivery of a deed to a town site by a probate judge, acting under and by virtue of the United States and territorial town-site statutes, is analogous to the granting of a patent by the governmental land department, and the same presumptions that exist in favor of the latter also exist in favor of the former. Neither can be impeached collaterally, nor the regularity of the proceedings anterior to its issue called in question in an action of law, where there was jurisdiction to dispose of the land. *Chever v. Horner*, 217.
2. **PUBLIC LANDS — COLLATERAL ATTACK ON PATENT.** — Where the officers of the government land department, while acting within the limits of their jurisdiction in issuing a patent, err in respect to their duty as to question of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if upon any state of facts the patent might have lawfully issued, and as against such collateral attack the existence of such necessary facts will be presumed. Parties aggrieved must resort to direct proceedings to set aside such patent. The same rule applies to a deed executed by a probate judge acting under and by

virtue of the United States and Colorado territorial town-site statutes. *Id.*

3. **PUBLIC LANDS. — DEED EXECUTED BY PROBATE JUDGE** assuming to act under and by virtue of the United States and Colorado territorial town-site statutes, reciting that entry and conveyance were made under and by virtue of and in accordance with such statutes, and that the grantee therein is entitled to the land as the rightful occupant, and also as the owner of the improvements thereon, is sufficient to raise a presumption, in an action of ejectment by a subsequent grantee from another probate judge, that the necessary initiatory steps were taken in conformity with law. Nor is the deed open in such action to attack for defects or omissions in such initiatory proceedings. *Id.*
4. **PRIORITY OF GRANT. — CONVEYANCE UNDER THE SWAMP-LANDS ACTS** could not pass title to anything which previously to those acts had been conveyed by the United States. *Fuller v. Dauphin*, 388.
5. **PATENT ISSUED BY UNITED STATES TO CENTRAL PACIFIC RAILROAD, UNDER ACT OF CONGRESS OF 1862, AND AMENDATORY ACT OF 1864, IS NOT CONCLUSIVE EVIDENCE** that the land covered by the patent is non-mineral in character; and one who claims the land under a subsequent mining patent may show, in an action by him against a grantee of the railroad company, that the land is mineral, and therefore excepted from the operation of the grant to the company. *Id.*

RAILROADS.

1. **IF RAILROAD BE SO CONSTRUCTED AND OPERATED OVER STREETS OF CITY AS UNREASONABLY TO OBSTRUCT** the abutting lot-owner's means of egress and ingress from and to his lot, or if he suffers special and substantial injury by having smoke, sparks, or cinders thrown into his house, or its walls be cracked by the movement of trains, etc., he may recover for the damages directly resulting from such causes. But before the road is built, and while it is yet a mere matter of speculation whether any such injury will result to the adjoining owners, its construction will not be enjoined merely because such injuries may result. *Fulton v. Short Route Co.*, 619.
2. **INJUNCTION. — CONSTRUCTION OF RAILROAD ALONG STREET IS NOT, PER SE,** an encroachment upon the individual right of the abutting lot-owner, and whether he can complain depends, not upon the fact of its existence, but the manner of its construction and operation. If he is thereby deprived of the reasonable use of the street, he may appeal to the courts for relief, but if he is merely inconvenienced, or suffers some remote consequential injury, it is *damnum absque injuria*. *Id.*
3. **RAILROAD COMPANIES — NEGLIGENCE. — MERE FACT THAT PROPERTY IS DESTROYED OR DAMAGED BY FIRE ORIGINATING** from sparks emitted from locomotive is not sufficient to fasten a liability upon the railroad company, but proof of that fact raises a presumption of negligence, consisting in a defect in the construction of the locomotive, or in the appliances used to prevent accidents from escaping sparks, or in want of care in its management, and casts on the company the burden to rebut the presumption. *Louisville & N. R. R. Co. v. Reese*, 66.
4. **QUESTION WHETHER DEATH OF PERSON WAS OCCASIONED BY GROSS NEGLIGENCE,** recklessness, and criminal misconduct of the employees of a railroad company, is for the jury, and not for the court, unless the evidence

to that end is perfectly conclusive and overwhelming. *Duane v. Chicago & N. W. R'y Co.*, 879.

5. **WHERE RAILWAY TRAIN, AFTER PASSING HIGHWAY CROSSING, IMMEDIATELY RETURNS**, a person approaching the crossing, and having no reason to expect such return of the train, is not bound to stop and look and listen before attempting to cross the track. *Id.*
 6. **ACTS OF ONE SURPRISED BY SUDDEN DANGER, HOW JUDGED.** — The law does not require that a person who is surprised and confused by a sudden danger should act or be judged according to any strict or fixed rule. *Id.*
 7. **DUTY OF RAILROAD COMPANY WHERE TRAIN PASSES CROSSING AND IMMEDIATELY RETURNS.** — Where a train passes a railway crossing, and almost immediately returns, it is the duty of the company to have warning given to persons who may be about to cross the track in the mean time. *Id.*
 8. **RAILROAD COMPANIES.** — CORPORATION CHARTERED TO BUILD "RAILROAD" MERELY HAS RIGHT TO ELEVATE IT wherever the character of the country makes it either convenient or essential to do so. Even if this right were questionable, it would be placed beyond doubt by an amended charter of the corporation referring to city ordinances requiring the road to be elevated at the street crossings. *Fulton v. Short Route Co.*, 619.
- See COMMON CARRIERS; FRANCHISES; MANDAMUS; MASTER AND SERVANT; STATUTE OF LIMITATIONS, 2; WATERS, 15-17.

RECORDS.

- PUBLIC RECORDS, WHO HAS RIGHT TO EXAMINE AND MAKE ABSTRACTS OF.** — Any person who has a present and existing interest in information to be obtained from the public records in any county office has a right to make an examination of such records to the extent of his interest, and to make copies, abstracts, extracts, or memoranda therefrom, under section 172 of the Kansas Compiled Laws of 1885, which provides, with respect to county officers, that "all books and papers required to be in their offices shall be open for the examination of any person"; and he may enforce such right by *mandamus*. *Boylan v. Warren*, 551.

RECOUPMENT.

See SET-OFF.

REFEREES.

See JUDGMENTS, 6.

REMAINDERS.

See ESTATES, 7.

REPLEVIN.

1. **DELIVERY OF THE PROPERTY, IN REPLEVIN, IS THE PRIMARY OBJECT** of the action. The value is to be recovered in lieu of it only in case a delivery of the specific property cannot be had. *Swantz v. Pillow*, 98.
2. **ALTERNATIVE JUDGMENT AGAINST DEFENDANT IN REPLEVIN DOES NOT GIVE HIM ELECTION** to pay the assessed value of the property, and retain it as his own, against the will of the plaintiff, although he has given a bond for the performance of the judgment, and had the property restored to him by the sheriff. *Id.*

- 3. PURCHASER FROM DEFENDANT IN REPLEVIN OF PROPERTY IN SUIT**, with actual notice of the litigation, buys at his peril, and must abide the result of the action the same as the party from whom he got his title. And if judgment be afterwards rendered against the defendant, and an execution thereon issued, it will be the duty of the sheriff under it to take the property from such purchaser, notwithstanding he may have paid full value for it. *Id.*

RES ADJUDICATA.

DECISION OF SUPREME COURT ON FORMER APPEAL AS TO CERTAIN QUESTION INVOLVED BECOMES LAW OF CASE, and will be followed on a second appeal. *Johnston v. S. F. Savings Union*, 129.

RESCISSION.

See **CONTRACTS; SALES, 4.**

REWARDS.

- 1. REWARD. — GENERAL OFFER OF REWARD FOR ARREST OF, WITH PROOF TO CONVICT**, ANY PERSON committing a specified offense is a promise conditional on doing the proposed acts, which, by performance, becomes a binding contract, the offer not being previously revoked. *Central R. & B. Co. v. Cheatham*, 48.
- 2. REWARD. — RAILROAD COMPANY HAS IMPLIED POWER TO OFFER a general standing reward for the detection, apprehension, and bringing to justice of persons who may obstruct its road, or otherwise offend against its property rights, and such authority is incident to the business and duties of the superintendent, and to the purposes of his department, and consequently is within the scope of his agency. *Id.***
- 3. REWARD. — PRINTED CIRCULAR WHICH PURPORTS BY ITS HEADING TO BE ISSUED IN NAME OF RAILROAD COMPANY**, offering a reward for the arrest of any person, with proof to convict, of maliciously obstructing the tracks of the company, and signed by its superintendent with the affix of the abbreviation of "superintendent" to his signature, is, on its face, the act or offer of the company, which is bound thereby. *Id.*
- 4. REWARD. — A CIRCULAR HAVING BEEN SENT BY MAIL TO PLAINTIFF SUING TO RECOVER the reward in response to a letter directed to the superintendent, and in an official envelope addressed in the handwriting of his secretary, the presumption is, in the absence of rebutting evidence, that it was an official transaction. *Id.***
- 5. REWARD. — ON QUESTION OF RATIFICATION, FACTS THAT CIRCULARS WERE POSTED at various public places on the line of the railroad, by direction of an employee, who was under the control of the superintendent, and remained posted for several months, and until after the rendition of the service, were proper to go to the jury, as tending to show that the officers of the company were cognizant of the superintendent's act in offering the reward. *Id.***
- 6. REWARD. — TERMS OF OFFER CONTAINED IN A CIRCULAR BEING GENERAL**, the offer applied equally to offenses either before or after the date of the circular. *Id.*

SALES.

- 1. CONDITIONAL SALE. — WRITTEN CONTRACT FOR LEASE of a piano of a certain value, subject to conditions that it shall be paid for by the party in**

possession in certain monthly payments; that in default of such payments the piano should either be returned to the owner or interest paid on such deferred payments, at his election; that the piano shall not be removed from the premises without the consent of the owner; that no agreement of sale is implied, nor shall a sale or purchase be deemed valid, without the written receipt of the owner, — is a conditional sale, and not a chattel mortgage, under which the vendor can recover possession of the piano for failure to comply with the conditions of the sale, or recover from the purchaser of such vendee who purchased with full knowledge of the nature and character of his vendor's title. *Gerow v. Castello*, 260.

2. SALES. — TITLE TO PERSONAL PROPERTY MAY PASS TO VENDEE without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties. *Greene v. Lewis*, 32.
3. SALE. — TITLE AT ONCE PASSES ON SALE AND DELIVERY OF HORSE TO BUYER for a reasonable price to be afterwards agreed on, and the fact that the parties cannot agree afterwards on a reasonable price makes no difference. *Id.*
4. ONE WHO RESCINDS A CONTRACT OF SALE FOR FRAUD PRACTICED ON HIM, and offers to return to the vendor the property purchased, is not obliged, on refusal of the vendor to receive the property, to keep it until the termination of the controversy between them. He may either retain the property as agent of the vendor, or, after notice to him, may, in good faith, sell it on his account. If, however, the purchaser gives the property away, or wantonly sacrifices it by selling it for a grossly inadequate price, he must account to the vendor for the difference between the price received and the reasonable value of the property, less the expense of keeping it up to the time of the sale. *Hambrick v. Wilkins*, 631.
5. BURDEN OF PROOF. — SALE OF GOODS MADE BY KNOWN INSOLVENT DEBTOR, GIVING PREFERENCE to one creditor to the prejudice of others, casts on the preferred creditor the burden of proving that the goods were acquired in absolute purchase, and at a price not materially disproportionate to their fair market value; but he is not bound to negative the reservation of a benefit to the debtor. *Roswald v. Hobbie*, 23.

SET-OFF.

RECOUPMENT. — IN AN ACTION ON A PROMISSORY NOTE, THE DEFENDANT may plead, by way of recoupment, that the note was given under a contract, by the terms of which the payee was to furnish wagons to be sold by the maker on commission, and was not to sell, nor furnish to be sold, any other wagons to any other dealer in the same town, and that the plaintiff, after furnishing wagons to the defendant, and receiving therefor the note in suit, violated his agreement by furnishing wagons to other dealers, whereby defendant was prevented from selling the wagons furnished him at any profit. The commissions for selling may furnish a criterion for estimating damages sustained by the defendant. *Andre v. Morrow*, 658.

SHERIFFS.

See EXECUTIONS.

SLANDER.

See LIBEL.

STATUTES.

1. STATUTE MUST NOT BE GIVEN RETROACTIVE EFFECT unless its language expressly requires it. *People v. O'Brien*, 684.
2. CHARACTER OF A STATUTE IS NOT DETERMINED BY ITS TITLE, but by its provisions, unless its language is ambiguous, in which event its title and the occasion of its enactment may be considered to assist a correct understanding of its terms. *Id.*
3. STATUTE PROVIDING PROCEEDINGS TO BE TAKEN ON THE DISSOLUTION OF A CORPORATION BY ACT OF THE LEGISLATURE MUST BE GIVEN A PROSPECTIVE OPERATION, and cannot be applied to a corporation so dissolved prior to the enactment of the statute. *Id.*

See CONSTITUTIONAL LAW; CORPORATIONS.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST ACCOUNT STATED FROM DATE OF STATEMENT, where an open account is verbally stated before the items comprising it are barred. *Kahn v. Edwards*, 141.
2. STATUTE OF LIMITATIONS. — IN ACTION AGAINST RAILROAD COMPANY FOR OBSTRUCTING WATER AND OVERFLOWING LAND, the right of action does not necessarily accrue from the time the obstruction was first built, and the plea of the statute of limitations is properly withheld from the jury when it appears that at that time the damages could not have been foreseen and estimated with any degree of accuracy, but depended in part on the seasons. *Sullens v. Chicago etc. R'y Co.*, 501.
3. STATUTE OF LIMITATIONS. — ENTRIES IN DEPOSITOR'S BANK-BOOK CONSTITUTE "EVIDENCE OF INDEBTEDNESS IN WRITING," within the meaning of the Illinois statute (section 16), since the entries having been made by the bankers, they charge themselves with the money deposited; and where the liability of stockholders must, under the charter of incorporation, be regarded as that of partners, the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned. *Shalucky v. Field*, 617.
4. STATUTE OF LIMITATIONS AGAINST A TAX TITLE. — Section 539 of the code of Mississippi, declaring that three years' occupation under a tax title shall bar any suit to recover the land, does not protect one who has a tax title, as against a subsequent tax sale and deed of the same lands. *Lewis v. Seibles*, 649.

See ADVERSE POSSESSION.

STREETS.

See TAXATION.

SUBROGATION.

1. SUBROGATION. — If a county treasurer, whose agent or deputy has misappropriated the public funds, takes a note from such agent for the sum misappropriated, with a third person as surety on the note, the county is entitled to be subrogated to the treasurer, and to enforce the note against the maker and his surety. *Board of Supervisors v. Alford*, 637.
2. SUBROGATION — RIGHT TO OF PURCHASER AT VOID JUDICIAL OR EXECUTION SALE. — One who, in good faith, under the belief that he is acquiring the title, purchases land at a void judicial or execution sale, and whose bid discharges a lien on the land, is entitled to restitution to the extent of

the lien discharged, before the defendant in the void proceeding, or his heirs, can recover the land so purchased by him. But such restitution cannot be awarded to such purchaser without proof that his bid discharged a subsisting lien which could be enforced against the land. *Meher v. Cole*, 101.

See VENDOR AND VENDEE.

SURETYSHIP.

1. SURETY WILL BE DISCHARGED if creditor by valid and binding agreement without the assent of surety gives further time for payment to the principal debtor. *Price v. Dime Savings Bank*, 367.
2. PRINCIPAL AND SURETY. — WHERE SURETY'S LAND IS LEVIED ON AND SOLD UNDER EXECUTION against principal and surety, and the principal buys the land, his purchase inures to the surety's benefit, since it was the principal's duty to discharge the execution. *Green v. Wintersmith*, 613.
3. SURETIES ON THE BOND OF THE SAME OFFICIAL FOR DIFFERENT TERMS. — If moneys are misappropriated by the agent of a county treasurer, and he conceals this fact, and procures moneys and exhibits them to the county officials during his term of office, and also during one or more settlements after entering on the discharge of his duties for a second term, and then proclaims the misappropriation, and refuses to make it good, his default must be regarded as having been made in the second term, and his sureties for that term are the ones who are answerable. *Board of Supervisors v. Alford*, 637.

See BONDS; EXECUTORS AND ADMINISTRATORS; SUBROGATION, 1.

SURVEY.

See BOUNDARIES.

TAXATION.

DECREE OF FORECLOSURE OF LIEN OF STREET ASSESSMENT CANNOT BE COL-
LATERALLY ATTACKED by one who claims under the defendant therein, by showing that prior to the decree the assessment had been paid, the decree being valid on its face, and rendered in an action in which the court had jurisdiction of the subject-matter and of the person of the defendant. *Ward v. Dougherty*, 151.

See DEEDS, 4, 5; STATUTE OF LIMITATIONS, 4.

TELEGRAPHS.

1. ACTION FOR BREACH OF CONTRACT FOR NEGLIGENT FAILURE TO TRANSMIT AND DELIVER MESSAGE MAY BE MAINTAINED AGAINST TELEGRAPH COMPANY by one to whom the message is sent, and the actual damages sustained, including the money paid for the transmission of the message, recovered, where, although the sender had no authority to send the message, it was for the benefit of the plaintiff, and the plaintiff returned the money paid for the transmission, and fully ratified the transaction. *West v. Western Union Tel. Co.*, 530.
2. EXEMPLARY DAMAGES MAY BE RECOVERED AGAINST TELEGRAPH COMPANY for failure to transmit and deliver message, where there is such gross negligence on the part of the agents of the company as to indicate wan-

tonness or a malicious purpose in failing to transmit and deliver the message. *Id.*

3. DAMAGES FOR MENTAL ANGUISH OR SUFFERING OCCASIONED BY FAILURE OF TELEGRAPH COMPANY TO TRANSMIT AND DELIVER MESSAGE ANNOUNCING DEATH of the plaintiff's brother, and the consequent delay in the announcement, whereby the plaintiff could not attend the funeral, cannot be recovered. *Id.*

TRADE-MARKS.

1. TRADE-MARKS. — TO CONSTITUTE VIOLATION OF RIGHT OF PROPERTY IN TRADE-MARK, it is not necessary that the trade-mark itself should be imitated. If the simulation in every other respect be such as to destroy the efficacy of the trade-mark, and induce the public to believe that the manufactured article is that of the real owner of the trade-mark, it becomes as much a violation of property as if the trade-mark itself had been used. *Avery v. Meikle*, 604.
2. TRADE-MARKS. — WHERE ONE'S RIGHT OF PROPERTY IN TRADE-MARK HAS BEEN VIOLATED, HE MAY ELECT to claim damages, or require the wrong-doer to account for profits. And the fact that the injured party, in an action in equity to restrain the wrong-doer, claimed "damages" will not preclude him from electing to take the "profits," which is the true criterion of damages in equity, no other special injury being alleged or claimed; nor will the plaintiff in such action be required to show affirmatively the extent of his injury, but the court will assume as matter of law that those purchasing the simulated goods would have been the customers of the plaintiff but for the simulation. *Id.*
3. TRADE-MARKS. — LACHES IN PROSECUTION OF CLAIM FOR PROFITS not such as to preclude relief under the circumstances of the particular case. *Id.*

TRESPASS.

1. BOUNDARY — TRESPASS. — Every one must know the boundaries of his own land; and in an action *quare clausum fregit* against him for passing his own boundaries and entering the land of another, he cannot defend by showing his ignorance of the boundary lines. Whether he or his servant acting within the scope of his employment committed the trespass is immaterial. *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 226.
2. EVIDENCE. — ANY CIRCUMSTANCE ATTENDING COMMISSION OF TRESPASS or wrong, although not set forth in the declaration, may be given in evidence with a view of affecting the question of damages, save where the circumstances within themselves constitute an independent cause of action. *Louisville etc. R. R. Co. v. Ballard*, 600.

TRUSTS AND TRUSTEES.

1. TRUST DOES NOT RESULT IN FAVOR OF THE GRANTOR IN A DEED WHEN IT RECITES A PECUNIARY CONSIDERATION, THOUGH NOMINAL, if the *habendum* declares a use in favor of the grantees, who are children of the grantor, and the deed contains covenants of warranty. *Moore v. Jordan*, 641.
2. DECLARATION OF TRUST BY PAROL BY GRANTEE IN FAVOR OF THE GRANTOR is void by the code of Mississippi. *Id.*
3. CONSTRUCTIVE TRUSTS IN REAL PROPERTY ARE EXCEPTED FROM OPERATION OF STATUTE OF FRAUDS, and may be established by parol. *Brisson v. Brisson*, 184.

4. **GRANTEE IS GUILTY OF ACTUAL FRAUD IF HE OBTAINS ABSOLUTE DEED WITHOUT CONSIDERATION BY MEANS OF PAROL PROMISE TO RECONVEY,** made without any intention of performing it, and cannot interpose the statute of frauds as a defense to an action to declare a constructive trust in the land. *Id.*
5. **GRANTEE'S VIOLATION OF PROMISE TO RECONVEY IS CONSTRUCTIVELY FRAUDULENT,** and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol promise to reconvey to the grantor, to whom he stands in a confidential relation, even if there be no intention at the time not to perform the promise. *Id.*

UNINCORPORATED SOCIETIES.

1. **COURTS WILL INTERFERE FOR PURPOSE OF PROTECTING PROPERTY RIGHTS OF MEMBERS OF UNINCORPORATED ASSOCIATIONS** in all proper cases, and when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character. *Otto v. Journeymen's etc. Union*, 156.
2. **MEMBER OF UNINCORPORATED ASSOCIATION, IN GOOD STANDING, ENTITLED TO PARTICIPATE IN ITS BENEFIT FUND, HAS PROPERTY RIGHTS INVOLVED,** which, if violated by the association, entitles him to the protection of the courts. *Id.*
3. **MEMBER OF UNINCORPORATED ASSOCIATION MAY BE EXPELLED THEREFROM** for a violation of such of its established rules as have been subscribed or assented to by the members, and as provide expulsion for such violation, or for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute. *Id.*
4. **UNINCORPORATED ASSOCIATION ACTS IN QUASI JUDICIAL CHARACTER IN MATTER OF EXPULSION,** and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive like that of a judicial tribunal. The courts will, however, decide whether the ground for expulsion is well taken. *Id.*
5. **MEMBER OF UNINCORPORATED ASSOCIATION WHO IS EXPELLED THEREFROM,** nominally for offense which would warrant such expulsion, but in reality for an offense which, by the rules of the association, is punishable by fine only, will be reinstated by the courts. *Id.*

USURY.

1. **USURY. — PAYMENT OF USURIOUS INTEREST ON ONE OF TWO NOTES** given for the purchase-money of land, in consideration of indulgence or forbearance, does not render the other note usurious, which remains in force without renewal, discharge, or cancellation, and the plea of usury is unavailing in defense of a suit to enforce the notes as a lien on the land. *Woodall v. Kelly*, 57.
2. **QUESTION OF USURY IS NOT RAISED BY PLEA OR ANSWER WHICH FAILS** to state distinctly the terms and nature of the alleged usurious agreement, and the specific amounts for which credits are claimed. *Id.*

VENDOR AND VENDER.

1. **VENDOR OF LAND DOES NOT LOSE OR WAIVE HIS LIEN THEREON BY TAKING NOTES** from his vendee for the unpaid purchase-money, and afterwards obtaining thereon a personal judgment at law, where the deed executed by him and accepted by the vendee reserved a specific lien to secure such purchase-money. *Dowdy v. Blake*, 88.
2. **SUBROGATION OF CO-PURCHASER OF LAND.** — Where two persons purchase land jointly, giving their joint note for the unpaid purchase-money, secured by a lien reserved in the deed, and one of them, to protect his own share, is compelled to pay the whole amount of the note, he will be subrogated to the vendor's security, and may enforce his right to reimbursement against his co-purchaser, or the latter's vendee, who, after partition, buys with notice of the encumbrance. *Id.*
3. **VENDOR'S LIEN.** — **WHEN PURCHASER OF LAND ASSUMES AS PART OR WHOLE OF AGREED PURCHASE-MONEY DEBT** which his vendor owes to a third person, and gives his note, payable to such third person, by mutual agreement among the three, the note continues to be a charge on the land as a vendor's lien, and, unless waived, may be enforced by the payee by bill in equity in his own name. *Woodall v. Kelly*, 57.
4. **QUESTION OF WAIVER OF VENDOR'S LIEN IS ONE OF FACT, OR INTENTION** manifested by acts or declarations of the contracting parties. And the taking of collateral security, or of a note for the purchase-money with the names of strangers, or other persons than the purchasers of the land, as personal securities, or co-makers, or indorsers, will *prima facie* be construed as a waiver of the lien; but this presumption is open to rebuttal by evidence that such was not the intention of the contracting parties. *Id.*
5. **VENDOR'S LIEN.** — **IF PURCHASER IN POSSESSION OF LAND CAN CLAIM ABATEMENT** of purchase-money, in a suit to enforce the vendor's lien, on the ground that the conveyance was void as to part of the land, the defense must be interposed by cross-bill or answer, alleging the insolvency of the vendor, and electing to recoup damages for the defect of title; and the defense must fail if it appears that the vendor is able and willing to perfect the conveyance, and relief is granted him on the express condition that he does so. *Id.*
6. **VENDOR'S LIEN — NOTICE.** — **PURCHASER OF LAND IS CHARGEABLE WITH NOTICE OF VENDOR'S LIEN** existing on the land at the time of his purchase, if he then knew that a part of the purchase-money was unpaid. He is put on inquiry by such knowledge as to the existence of the lien. *Id.*

See CHAMPERTY.

WATERS.

1. **POWER OF WISCONSIN AND MINNESOTA TO AUTHORIZE CONSTRUCTION OF BOOMS IN ST. CROIX RIVER.** — The provision of the ordinance of 1787, which was substantially incorporated into the enabling acts for the admission of the states of Wisconsin and Minnesota, and into the constitutions of those states, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, . . . without any tax, impost, or duty therefor," was not intended to prevent obstructions to the navigation of such waters, but to prohibit the levying of any tax

on such navigation; and until Congress sees fit to legislate on the subject, those states may authorize the construction in such waters of booms for intercepting, storing, and handling logs, although such booms may materially interfere with navigation by steamboats and other watercraft. *Keator L. Co. v. St. Croix B. Co.*, 837.

2. **CONCURRENT JURISDICTION OF STATES OVER RIVER FORMING BOUNDARY BETWEEN THEM.** — Wisconsin and Minnesota having, by their constitutions, concurrent jurisdiction over the St. Croix River, forming the boundary between them, either state, acting independently of the other, may, in the absence of legislation by Congress to regulate commerce on said river, authorize the construction of booms for the interception, storage, and handling of logs in said river, within its own territory; but it cannot, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portions of the river. *Orton, J.*, dissenting. *Id.*
3. **QUESTION WHETHER ONE STATE HAS INFRINGED JURISDICTION OF ANOTHER OVER BOUNDARY RIVER, NOT AVAILABLE TO MERE PRIVATE PARTY.** — If Minnesota attempts to grant a corporation authority to construct booms in the boundary river between it and Wisconsin, within the territory of the latter state, or if such corporation, under its charter, assumes such authority, mere private parties, claiming to be damaged by the obstruction thereby caused to navigation, cannot, in an action against such corporation, be heard upon the question as to whether Minnesota has infringed upon the rightful jurisdiction of Wisconsin. *Id.*
4. **BOOM CORPORATION NOT LIABLE FOR NOT GOING OUTSIDE OF ITS CHARTER POWERS.** — A boom corporation, bound by its charter to use all possible means for the speedy removal of logs, is not liable for the obstruction to navigation caused by an unusual jam of logs in its boom merely because it fails to go outside of its charter powers and invade the territory of an adjoining state by taking possession of a lake there, for the purpose of keeping its booms clear. *Id.*
5. **WATER RIGHTS.** — **APPROPRIATOR OF WATER OF STREAM** for irrigation acquires a prior right thereto as against the riparian owner of land along such stream, who obtained patent for such land after such appropriation had been made, but before the operation of the amendment of July 9, 1870, to act of Congress of July 26, 1866, requiring that patents to public lands, thereafter to be issued, shall be subject to any vested or accrued water rights. *Hammond v. Rose*, 258.
6. **WATER RIGHTS.** — **WATER OF STREAM CAN BE DIVERTED** by appropriation for irrigation to the exclusion of any riparian owner along such stream under the law in Colorado, even when the lands to be irrigated are not located on the banks, margin, or neighborhood of such stream. *Id.*
7. **WATER RIGHTS.** — **COMMON-LAW DOCTRINE** giving riparian owner a right to the flow of the stream in its natural channel upon and over his lands, even though he makes no beneficial use of it, is inapplicable to Colorado. The first appropriator of water from the stream for a useful purpose has, subject to constitutional and statutory qualifications, a prior right thereto, to the extent of his appropriation, and this right is entitled to protection as well after patent to a third party of the land over which the stream flows as when the land is a part of the public domain. The right acquired by prior appropriation is not dependent upon the *locus* of its application to the beneficial use designed. *Id.*

8. **RIPARIAN PROPRIETOR IS ENTITLED TO INJUNCTION RESTRAINING UNLAWFUL DIVERSION OF WATERS OF STREAM**, although the injury caused by the diversion is incapable of ascertainment, or of being computed in damages. *Heilbron v. Fowler Switch Co.*, 183.
9. **RIGHTS OF RIPARIAN PROPRIETOR DO NOT DEPEND UPON QUANTITY OF WATER** flowing in the stream. *Id.*
10. **RIPARIAN PROPRIETOR CANNOT AUTHORIZE CORPORATION TO TAKE WATER FROM STREAM**, to be conducted to a distance and there sold, as against a lower proprietor. *Id.*
11. **TENANT FOR YEARS OF LAND BORDERING ON STREAM, WITH PRIVILEGE OF PURCHASING DURING TERM, MAY ENJOIN UNLAWFUL DIVERSION** of the waters of the stream, the injunction necessarily becoming inoperative if the estate which it was designed to protect ceases. *Id.*
12. **ACTION TO RESTRAIN DIVERSION OF WATERS OF STREAM AND FOR RECOVERY OF DAMAGES CANNOT BE PLEADED IN ABATEMENT** of a subsequent action brought by the same plaintiffs and others against the same defendant, in which no damages are asked, and in which the complaint charges the actual diversion and threats to continue the same at a date subsequent to the bringing of the first action. *Id.*
13. **RIGHT TO TAKE SHELL-FISH FROM NATURAL BEDS IN TIDE-WATERS** of this state is a part of the public right of fishery common to all the citizens of the state, which may be exercised by them at will, except so far as it is restrained by positive law, or by grants from the state to individuals. And they cannot be deprived of this right by the unauthorized attempt of a person to appropriate the bed of the waters to his own private use. *Brown v. De Groff*, 794.
14. **CITIZEN WHO, IN TAKING CLAMS FROM NATURAL BEDS, INJURES OYSTERS** planted thereon without authority, is not liable to the owner of the oysters for such injury, provided he acts with reasonable care, and does no unnecessary damage to the oysters. *Id.*
15. **SURFACE WATERS. — WHERE RAILROAD COMPANY** whose road crosses a stream constructs an embankment over the low lands and valley adjacent thereto in such manner as to turn all the water which flowed from above into the main stream, and builds a culvert over the stream, which is not of sufficient capacity to properly pass the waters of such floods as might reasonably be expected to occur, it is liable in damages to one whose lands are overflowed by reason of the construction of such embankment and insufficient culvert. *Sullens v. Chicago etc. R'y. Co.*, 501.
16. **SURFACE WATERS, WHAT CONSTITUTE. —** Water which overflowed from the main stream some distance above an embankment ceases to be surface water when turned back into the stream by such embankment, and must be regarded, in determining the sufficiency of the culvert, the same as if it had continuously flowed in the channel. *Id.*
17. **OVERFLOWING LAND — MEASURE OF DAMAGES. —** WHERE RAILROAD COMPANY CONSTRUCTS INSUFFICIENT CULVERT OVER STREAM, and an embankment over low lands and valley adjacent, and thereby obstructs the water, and causes it to overflow land, there is no error in instructing the jury that in estimating damages they may consider the fair market value of the land immediately before and immediately after the overflow in each year, and that the term "land" so used includes the growing crops. *Id.*
18. **PLEADING. — DECLARATION IN TRESPASS FOR OBSTRUCTING FLOW OF WATER AND OVERFLOWING PLAINTIFF'S LAND** to his injury is defective if

it fails to aver that defendant was notified or requested to remove the obstruction. *Groff v. Ankenbrandt*, 342.

See BOUNDARIES, 2, 3; STATUTE OF LIMITATIONS, 2.

WILLS.

1. **WILL — NON-EXPERT EVIDENCE OF TESTATOR'S MENTAL CAPACITY.**— Upon a question as to the testamentary capacity of testator, neighbors of the decedent who were well acquainted with him are competent to give opinions as to his sanity, and may testify as to his appearance, as to whether his mind was weakened, the general state of his health when last seen, and his ability to hold an extended conversation. There must of necessity be expressions of opinions by witnesses in regard to appearance, conversation, and acts of one whose mental capacity is brought in question. *Meeker v. Meeker*, 489.
2. **Id.** — Upon question of testator's capacity to make a will, witnesses may detail conversations had in his presence regarding his condition of mind, and that he remained silent. *Id.*
3. **TESTAMENTARY CAPACITY.**— ALTHOUGH HYPOTHETICAL QUESTIONS PUT TO EXPERTS should as a general rule be based upon facts which the evidence tends to prove, yet it is not required that the facts should be conceded, nor is technical accuracy required in framing the questions. *Id.*
4. **DEFINITION OF MENTAL CAPACITY REQUIRED IN MAKING A WILL.**— A person of sound mind in such case is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and to do business generally, nor to engage in complex and intricate business matters. *Id.*
5. **MENTAL CAPACITY OF TESTATOR — INSTRUCTIONS AS TO WEIGHT OF EXPERT EVIDENCE.** — Where two physicians testified for proponents and two for contestants in a will case, and their evidence was based upon personal examination by them of decedent made to determine his mental capacity, an instruction to the jury that testimony of physicians of large experience is usually in such cases entitled to more weight than that of unprofessional witnesses, but that in the case on trial it was a question for the jury whether the testimony of the medical men was entitled to more weight than that of other witnesses, is correct. *Id.*
6. **TAXATION OF COSTS AGAINST EXECUTOR IN WILL CONTEST.**— It is the duty of executor to probate will of his testator, and he should not be held personally liable for costs in the absence of showing of bad faith or the like, especially where the verdict in such will contest was general, and an examination of the evidence clearly shows that it was founded upon a want of testamentary capacity in the decedent. *Id.*
7. **PROBATE OF WILL IN FOREIGN JURISDICTION IS CONDITION PRECEDENT TO MAKING RECORD THEREOF** in New Jersey, and the fact of such probate must appear by the certificate transmitted with the exemplified copy of the will. If the surrogate record a will without such certificate, his record is a nullity, and he can make no transcript of such a record which will be competent evidence. An affidavit of an attorney at law that the

will has been admitted to probate in the state from which the copy is exemplified is not sufficient. *Lindley v. O'Reilly*, 802.

8. **PROOFS UPON PROBATE OF FOREIGN WILL, WHEN MUST BE EXEMPLIFIED.**
— When the object of making a will admitted to probate in another state a record in New Jersey is to use it in making title to lands, the record exemplified from such other state must contain the proofs taken on the probate there, that it may appear therefrom that the will was made and executed in the manner and with the formalities prescribed by the statute of New Jersey for devises of land. *Id.*
9. **DEVISE TO SEVERAL PERSONS EQUALLY, AND WHEN EITHER DIES HIS SHARE TO BE DIVIDED AMONG THE REST,** vests the property in the devisees as tenants in common, with cross-remainders between them, and the ultimate limitation to the last survivor. The heirs of the devisees other than of the last survivor acquire no title to the property. *Reber v. Dowling*, 651.

WITNESSES.

1. **WITNESS MAY ALWAYS REFRESH HIS MEMORY FROM A MEMORANDUM,** when he does in fact testify from his memory thus refreshed; and it is no objection to the memorandum that it was written by the witness's son, in his presence and at his dictation, for it is the memorandum of the witness, and not that of the son. *Card v. Foot*, 311.
2. **ATTENDING PHYSICIAN MAY NOT, IN ACTION TO SET ASIDE WILL, TESTIFY,** against objection, as to mental and physical condition of the testator, nor divulge, in such action, any information acquired by him while in the necessary discharge of his professional duty: Indiana R. S. 1881, sec. 497. *Heuston v. Simpson*, 409.

See **HUSBAND AND WIFE**, 2-4.

WRITS OF ERROR.

UNDER A WRIT OF ERROR, THE COURT WILL NOT DECIDE QUESTIONS OF FACT, and will look into the evidence only to discover whether it affords, on any permissible interpretation of it, a rational support of the findings made by the trial court. *Voorhis v. Terhune*, 781.

WRITS OF POSSESSION.

See **EJECTMENT**, 2.

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